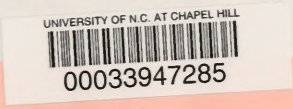
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ATTORNEY GENERAL REPORTS

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RUFUS L. EDMISTEN
ATTORNEY GENERAL

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ATTORNEY GENERAL

REPORTS

Opinions of the Attorney General
July 1, 1974 through December 31, 1974

MAILING ADDRESS:
Post Office Box 629
Raleigh, North Carolina 27602

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RUFUS L. EDMISTEN
Attorney General

Harry W. McGalliard
Chief Deputy Attorney General

Jean A. Benoy
James F. Bullock
I. Beverly Lake, Jr.
Andrew A. Vanore, Jr.

Robert Bruce White, Jr.
Deputy Attorneys General

Charles H. Smith
Administrative Deputy
Attorney General

Howard A. Kramer
Deputy Attorney General
for Legal Affairs

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Special Assistant to the Attorney General

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Robert G. Webb
Wm. Woodward Webb
Thomas B. Wood

Assistant Attorneys General

8/8315

John W. McDevitt, Consultant
Herbert Lamson, Jr., Claims Attorney
Charles J. Murray, Revisor of Statutes

Noel L. Allen
Archie W. Anders
Jesse C. Brake
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Robert R. Reilly
Thomas M. Ringer, Jr.
Jerry J. Rutledge
James M. Wallace, Jr.
Raymond L. Yasser

Associate Attorneys

10 July 1974

Subject:	State Departments, Institutions and Agencies; Department of Correction; Amendment of Sentence
Requested by:	Mr. James P. Smith Senior Administrative Assistant Department of Social Rehabilitation & Control
Question:	Is the Department of Correction required to reduce an inmate's prison sentence as the result of post term court orders?
Conclusion:	No.

Neither the statutory nor the common law of the State of North Carolina contains any provision for post sentence hearings on reduction of sentence and once a term of court comes to an end, the judge is without authority to vacate or modify the judgment.

In *State v. Lewis*, 226 N.C. 249, 37 S.E. 2d 691 (1946), the Supreme Court of North Carolina stated:

> "After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or to interfere with it in any way." (at 251)

More recently, in *State v. Lawrence*, 264 N.C. 220, 141 S.E. 2d 246 (1956), the Supreme Court reaffirmed this holding by stating that:

> ". . .After the term ended the judge was without authority to vacate or modify the judgment . . ." (at 223)

See, also, *State v. Godwin*, 210 N.C. 447, 187 S.E 2d 560 (1936).

Regarding the District Courts, the Court stated in *State v. Lawrence, supra:*

> "Where the length of the term of an inferior court is not expressly stated by statute other than it shall continue until the business before it is disposed of, the term cannot last beyond the time fixed for the next succeeding term, unless perhaps a trial in actual progress should extend it . . . ." (at 223)

Furthermore, once the term of court comes to an end, only the Governor of this State may grant reprieves, commutations and pardons. In *State v. Lewis, supra*, the Supreme Court directly spoke to this issue by stating:

> "The power of pardon, parole or discharge during the term of imprisonment is by the Constitution the exclusive prerogative of the Governor." (at 251)

Although *State v. Lewis, supra*, refers to Article III, Sec. 6 of the North Carolina Constitution of 1868, its holding is equally applicable to Article III, Sec. 5(6) of the North Carolina Constitution of 1970. Although the power to parole contained in the 1868 Constitution has now been given by the General Assembly to the North Carolina Board of Paroles (see Article 4, Chapter 148 of the General Statutes), the 1970 Constitution provides that:

> "The Governor may grant reprieves, commutations, and pardons . . ."

In view of the foregoing, it is our opinion that after a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or to interfere with it in any way, as the power of reprieve, commutation and pardon during the term of imprisonment is by the Constitution of North Carolina the exclusive prerogative of the Governor. Cf. *In Re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954).

Robert Morgan, Attorney General
Jacob L. Safron
Assistant Attorney General

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10 July 1974

Subject: Mental Health; Infants and Incompetents; Rights of Minor Patients in Treatment Facilities

Requested by: Dr. Lenore Behar, Chief
Children and Youth Services
Division of Mental Health Services

Questions: (1) Do the provisions of G.S. 122-55.13 terminate the parental-child relationship between a minor patient in a North Carolina treatment facility and his parent or parents?

(2) Is it a violation of the rights of a minor patient in a North Carolina treatment facility to notify his parent or parents: (a) of his presence there when he is a runaway from home? (b) of the fact he has been or is being treated for venereal disease? or (c) of the fact that he has attempted to commit suicide?

Conclusions: (1) The provisions of G.S. 122-55.13 do not terminate the parental-child relationship between a minor patient in a North Carolina treatment facility and his parent or parents.

(2) It is not a violation of the rights of a minor patient in a North Carolina treatment facility to notify his parent or parents: (a) of his presence there when he

> is a runaway from home; (b) of the fact that he has been or is being treated for venereal disease; or (c) of the fact that he has attempted to commit suicide.

The 1973 Session (2nd Session 1974) of the General Assembly of North Carolina singled out minor patients in North Carolina treatment facilities for special consideration. As a result, Part 3 of Article 3, Chapter 122 is devoted to the rights of minor patients and is tailored to meet their particular requirements. G.S. 122-55.13 declares an intention to protect the minor patients' rights to "dignity, humane care, and proper adult supervision and guidance". This section clearly provides:

> "In view of the physical, emotional, and intellectual immaturity of the minor, the treatment facility shall stand *in loco parentis* to the minor when he is in residence."

It would appear that this placement of responsibility upon the treatment facility has raised the question as to the exact status of the parent of a minor patient during the period of time that the minor is in a treatment facility. Examination of Part 3 of Article 3, in its entirety, however, dispels any illusions that the General Assembly had intended to tamper with the relationship between minor patients and their parents. It is clear that what was intended was to create a status of authority on the part of the facility to safeguard the welfare of minor patients on an around-the-clock basis and to permit the facility to perform functions which the parents normally would perform were they not geographically separated from the minor. That there was no intention to interrupt the normal parental relationship is manifested by the provisions of G.S. 122-55.14 which specifically guarantee the minor patients' rights to communicate with individuals having legal custody of them and to consult with private mental health mental retardation specialists chosen by their legal custodians.

This State has long adhered to the principle that " . . . the law seeks to work in harmony with nature, and to continue those ties which bind man to his own flesh . . ." See *James v. Pretlow*, 242 N.C. 102, 105 (1955). Any termination of the parent-child

relationship predicated solely upon a minor's patient status in a treatment facility would do unwarranted violence to this basic principle.

In view of this continuation of the normal parental relationship, it becomes obvious that there is no abrogation of any right of a minor patient in communicating to his parent or parents information dealing with his location, his physical or mental condition, or his actions. Implicit in the language of G.S. 90-21.1 through G.S. 90-21.5 is a recognition by the General Assembly of the nature of such a relationship. By these statutes, treatment of minors by qualified physicians acting without the consent of parents was legitimized in certain emergency situtations. The language throughout these statutes clearly conveys the underlying theme that leaving the parents out of the picture will be the exception rather than the norm. Further, it is difficult to visualize how the responsible adult could determine the advisability of procuring the assistance of private mental health mental retardation specialists (as guaranteed by G.S. 122-55.14)if he is not afforded the benefit of all information pertinent to the condition and treatment of the minor. Further indication of the intent of the Legislature on this score is found in the provisions of G.S. 122-56.5 providing that a parent, *inter alia*, shall act for a minor who has been voluntarily admitted to a treatment facility in consenting to medical treatment; again, any such consent should clearly be an enlightened one.

One specific comment is in order with regard to information that a minor is being treated for venereal disease. G.S. 90-21.5 specifically addresses the subject of venereal disease and authorizes, in this limited area, treatment based upon the minor's consent. Nevertheless, this excusable of the need for a before the fact consent by a responsible adult does not preclude an after the fact report of this or any other pertinent aspect of the patient's condition to such responsible adult.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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10 July 1974

Subject:	Mental Health; Infants and Incompetents; Voluntary Admission of Runaway Minors to Treatment Facilities
Requested by:	Dr. Lenore Behar, Chief Children and Youth Services Division of Mental Health Services
Question:	In an emergency situation may a runaway minor may be voluntarily admitted to a North Carolina treatment facility under the provisions of Article 4, Chapter 122, upon his request but without an application for admission being submitted by his parent, parents, or other person having legal custody of him?
Conclusion:	In an emergency situation a runaway minor may be voluntarily admitted to a North Carolina treatment facility under the provisions of Article 4, Chapter 122, upon his request without application for admission by his parent, parents, or person having legal custody of him.

This question has arisen because of the provisions of G.S. 122-56.5, as follows:

> "§122-56.5. *Representation of minors and persons adjudicated non compos mentis.* In applying for admission to a treatment facility, in consenting to medical treatment when consent is required, in giving or receiving any legal notice, and in any other legal procedure under this Article, a parent, person standing *in loco parentis*, or guardian shall act for a minor, and a guardian or trustee shall act for a person adjudicated *non compos mentis.*"

The phraseology of this Section, standing alone, and interpreted

literally, would appear to mandate the presentation of an application for admission by a responsible adult as an absolute prerequisite to admission of a minor to a treatment facility. Further, although G.S. 122-55.13 provides that " . . . the treatment facility shall stand *in loco parentis* to the minor when he is in residence", no such provision is made for the period prior to his becoming a resident of the facility.

However, elsewhere in the General Statutes the legislators have provided for situations wherein treatment of minors is required on an emergency basis. G.S. 90-21.1 authorizes a medical doctor to render treatment to any minor without consent of the parents, etc., where: (1) The responsible adult cannot be located or contacted with reasonable diligence in time to meet the minor's needs for treatment; or (2) where the identity of the minor is unknown or the necessity for immediate treatment is so apparent that delaying treatment in an effort to secure approval would endanger the minor's life; or (3) where an effort to contact the responsible adult would result in delay that would seriously worsen the minor's condition. G.S. 90-21.2 defines the word "treatment" as " . . . any medical procedure or treatment, including X-rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician licensed to practice medicine in the State of North Carolina that is used, employed, or ordered to be used or employed commensurate with the exercise of reasonable care and equal to the standards of medical practice normally employed in the community where said physician administers treatment to said minor."

It is clear that the treatment required by a minor suffering from mental illness would fall within this definition. It is equally clear that admission of the minor patient to the facility wherein he is to receive this treatment is an integral and vital part of the treatment itself. Therefore, when the situation is of an emergency nature of a type as described by G.S. 90-21.1, a minor may be admitted to a North Carolina treatment facility without the application for admission being presented by a responsible adult.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

10 July 1974

Subject:	Mental Health; Involuntary Commitment; Return of Respondent to Mental Health Facility for Treatment Pending Commitment Hearing
Requested by:	Dr. N. P. Zarzar, Director Division of Mental Health Services Department of Human Resources
Question:	Is it necessary to initiate a new affidavit as the basis for securing the involuntary readmission to a mental health facility of a patient who has been released therefrom pending his hearing in district court but whose condition has changed so as to require prehearing inpatient treatment?
Conclusion:	It is necessary to initiate a new affidavit as the basis for securing the involuntary readmission to a mental health facility of a patient who has been released therefrom pending his hearing in district court but whose condition has changed so as to require prehearing inpatient treatment.

G.S. 122-58.6 deals with prehearing disposition of a respondent in an involuntary commitment case. This Section requires an examination of a respondent by a qualified physician within 24 hours of his arrival at the facility and the results of this examination determine his prehearing status. If the qualified physician finds that the respondent is mentally ill or an inebriate and is imminently dangerous to himself or others, the respondent is held at the facility pending the hearing. Conversely, if the qualified physician finds that the respondent is not mentally ill or inebriate or is not imminently dangerous to himself or others, he releases the respondent pending his district court hearing and notifies the clerk of superior court to that effect.

No specific directives are contained in G.S. 122-58.6 relative to the individual who has been initially released from the facility pending his commitment hearing but whose changed condition apparently indicates the advisability of prehearing involuntary inpatient treatment. However, the underlying theme running through the present involuntary commitment statutes is a prohibition of any semblance of arbitrary, capricious, questionable, or unnecessary restraints upon an individual processed thereunder. Indicative of the legislative feeling relative to appropriate documentation are the provisions found in G.S. 122-58.6 dealing with a respondent who has been released prior to his hearing but who then improperly fails to appear for his hearing. Even in that aggravated situation, an order of the responsible judge is required in order to take the respondent into custody and return him to the mental health facility.

In the situation described in the question, some form of reliable information must be available in order to justify altering the earlier professional determination of the qualified physician regarding the need for holding the respondent prior to his hearing. The initiation of action designed to involuntarily commit a mentally ill or inebriate person is required to be based upon an affidavit of a person having knowledge of the facts and the entire situation. See G.S. 122-58.3 and G.S. 122-58.18. Similarly, the spirit of the involuntary commitment statutes -- as well as efficient, effective and just practices and procedures -- requires documentation in the form of a new affidavit in order to warrant reversal of the preliminary decision that restraint of the respondent is not necessary prior to his hearing.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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10 July 1974

Subject: State Departments, Institutions and Agencies; Department of Natural and Economic Resources; Sedimentation Control Commission; Chairman

Requested by:	Mr. James E. Harrington, Secretary Department of Natural and Economic Resources
Question:	Under the provisions contained in Chapter 1262, Sections 40 and 41, 1974 Session Laws, reorganizing the Department of Natural and Economic Resources, and under those contained in Chapter 1417, Section 2, 1974 Session Laws, amending the Sedimentation Pollution Control Act of 1973, did the Secretary of the Department of Natural and Economic Resources again become the Chairman of the Sedimentation Control Commission on 1 July 1974?
Conclusion:	No, Chapter 1417, Section 2, not only amends G.S. 113A-53, but also amends by implication Chapter 1262, Section 40, so as to provide that the Governor shall designate a member of the Commission to serve as Chairman.

On 13 April 1974, Chapter 1417, 1974 Session Laws, amending the Sedimentation Pollution Control Act of 1973, was ratified by the Legislature. It removed the Secretary of the Department of Natural and Economic Resources (DNER) from membership on the Sedimentation Control Commission, where he had been Chairman as so provided in G.S. 113A-53(a)(1). This Chapter became effective upon its ratification on April 13.

On 11 April 1974, two days earlier, the Legislature had ratified Chapter 1262, 1974 Session Laws, reorganizing DNER. The effective date of this law was 1 July 1974. Section 40 of this Chapter simply copied G.S. 113A-53, as it existed before Chapter 1417 amended it, and Section 41 repealed G.S. 113A-53 on 1 July, the effective date. Therefore, on 1 July 1974 when G.S. 113A-53 was repealed, the authorizing provision for the Commission then became Section 40 of Chapter 1262.

If literal effect were to be given to these two enactments, the result would be that on April 13, the date on which Chapter 1417 became effective, the Secretary of DNER was removed from membership on the Commission and was replaced as Chairman by a member of the Commission designated by the Governor. Then, on July 1, the effective date of Chapter 1262, the Secretary of DNER again became a member of the Commission and its Chairman.

This gives rise to the question of whether or not the Secretary of DNER did, indeed, again become the Chairman of the Sedimentation Control Commission on July 1. In the opinion of this Office, the answer is "no".

It is well established that the intent of the Legislature controls the interpretation of the statute. *Person v. Garrett*, 280 N.C. 163, 165, 184 SE 2d 873 (1971); *State Highway Commission v. Hemphill*, 269 N.C. 535, 538, 153 SE 2d 22 (1967); *Shue v. Scheidt*, 252 N.C. 561, 564, 114 SE 2d 237 (1960). G.S. 143B-14(b) prohibits the Secretary of DNER from serving as Chairman of the Sedimentation Control Commission. Consequently, G.S. 113A-53 was amended by Chapter 1417, Section 2, 1974 Session Laws, in order to make it conform with the statutory requirements of G.S. 143B-14(b).

However, Chapter 1262, 1974 Session Laws, which was ratified two days before Chapter 1417, but did not become effective until two and one-half months after it, simply copied verbatim G.S. 113A-53, as it existed before Chapter 1417 amended it. Since legislative intent controls the interpretation of the statute, it is our opinion that Chapter 1417, Section 2, has the effect of amending, by implication, Chapter 1262, Section 40, so as to permanently remove the Secretary of DNER from his position as Chairman of the Sedimentation Control Commission.

Furthermore, if possible, the language of the statute will be interpreted to avoid absurd consequences. *Person v. Garrett, supra* at 166; *Hobbs v. Moore County*, 267 N.C. 665, 671, 149 SE 2d 1 (1966). In the matter currently under consideration, since the purpose of Chapter 1417, Section 2, was to remove the Secretary of DNER as Chairman of the Sedimentation Control Commission in order to conform to the requirements of G.S. 143B-14(b), it

would be an absurd consequence to rename him as a member of the Commission and as Chairman on July 2, in derogation once more of G.S. 143B-14(b), the very ill which Chapter 1417, Section 2, was enacted to cure.

An amendment or repeal of statutes by implication is not favored in this jurisdiction. *Person v. Garrett, supra*, at 165; *State v. Hockaday*, 265 N.C. 688, 691, 144 SE 2d 867 (1965); *In re Halifax Paper Company, Inc.*, 259 N.C. 589, 594, 131 SE 2d 441 (1963). A later statute will not amend or repeal a former statute unless the two are in irreconcilable conflict, and amendment or repeal by implication is necessary. *Person v. Garrett, supra; In re Halifax Paper Company, Inc., supra; Ivey v. North Carolina Prison Department*, 252 N.C. 615, 619, 114 SE 2d 812 (1960); 7 *North Carolina Index 2d*, Statutes §11, at 84-85. However, where two statutes relating to the same subject are passed at the same or different sessions of the Legislature, and they are in irreconcilable conflict, the statute first enacted must give way to the latter to the extent of the conflict, the latest expression of the legislative will or intent being the law. *Bland v. Wilmington*, 278 N.C. 657, 661, 180 SE 2d 813 (1971); *Victory Cab Company v. Charlotte*, 234 N.C. 572, 577, 68 SE 2d 433 (1951); *Guilford County v. Estates Administration, Inc.*, 212 N.C. 653, 655, 194 SE 2d 433 (1937); *Road Commissioners v. County Commissioners*, 186 N.C. 202, 204-205, 119 SE 206 (1923); *North Carolina Index 2d, supra.*

Thus, Chapter 1417, Section 2, being the latter statute enacted, thereby is deemed to evidence the latest expression of the legislative intent or will, and has the legal effect of amending, by implication, Chapter 1262, Section 40, so as to remove the Secretary of DNER from his position as Chairman of the Sedimentation Control Commission. This is so even though Chapter 1417 was ratified only two days after Chapter 1262 and even though Chapter 1262 did not become effective until two and one-half months after Chapter 1417. We believe that this latter fact is inconsequential, carrying no legal implications.

Therefore, since the legislative intent was to remove the Secretary of DNER from his position as Chairman of the Sedimentation Control Commission and since an absurd result would be reached

if he were allowed to become the Chairman again on July 1 and since Chapter 1417 was the latter bill enacted, thus evidencing the latest expression of the legislative will, although it became effective before Chapter 1262, it is the opinion of this Office that Chapter 1417, Section 2, has the effect of amending, by implication, Chapter 1262, Section 40, thus removing the Secretary of DNER from his position as Chairman of the Sedimentation Control Commission in conformity with G.S. 143B-14(b). Consequently, on July 1, he was not reinstated as Chairman.

Robert Morgan, Attorney General
Kenneth B. Oettinger
Associate Attorney

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10 July 1974

Subject: Mental Health; Involuntary Commitment; Supervision and Treatment of a Respondent Detained in a Community Mental Health Center or Regional Mental Health Facility

Requested by: Dr. N. P. Zarzar, Director
Division of Mental Health Services
Department of Human Resources

Questions: (1) During the detention of a respondent at a community mental health center or a regional mental health facility prior to his involuntary commitment hearing, is appropriate supervision over him the responsibility of such facility or center?

(2) May respondent who is in detention in a community mental health center or a regional mental health facility prior to his involuntary commitment hearing be given medication or other treatment for his mental illness or inebriety?

Conclusions:

(1) A community mental health center or regional mental health facility is responsible for the appropriate supervision of a respondent detained there prior to his involuntary commitment hearing.

(2) While detained in a community mental health center or a regional mental health facility prior to his involuntary commitment hearing a respondent may be given reasonable and appropriate medication and treatment consistent with accepted medical standards if such is given under the direction of the attending qualified physician.

Article 5A of Chapter 122 vests considerable responsibility in the law enforcement officer with regard to taking a respondent into custody during the initial stages of an involuntary commitment proceeding and taking him to the appropriate facility or place for examination. Provisions are also made for the law enforcement officer to secure such detention of the respondent as is necessary to process the case. Further, the Article is clear that the law enforcement officer is responsible for getting the respondent to the right place for detention and/or examination. However, there is nothing in Article 5A which would impose any duty on the law enforcement officer to personally exercise supervision over the respondent while he is being detained at a community mental health center or a regional mental health facility. Quite to the contrary, the Article provides that the qualified physician at the center or facility "shall hold the respondent at the facility" or "shall release the respondent" based upon his determinations. See G.S. 122-58.6.

Certain other functions such as later transporting a respondent or taking him into custody and returning him to the hospital devolve upon the law enforcement officer. Nevertheless, the whole tenor of Article 5A is indicative of the fact that the supervisory responsibility over the respondent while he is actually detained at a center or facility is that of the qualified personnel at such center or facility. Further exemplification of this legislative intent to make

the center or facility responsible for the respondent's welfare is found in the provisions of G.S. 122-58.6(c) as follows:

> "(c) Pending the district court hearing, the qualified physician attending the respondent is authorized to administer to the respondent reasonable and appropriate medication and treatment that is consistent with accepted medical standards."

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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10 July 1974

Subject: Mental Health; Involuntary Commitment; Determination of Place of Detention Prior to Commitment Hearing

Requested by: Dr. N. P. Zarzar, Director
Division of Mental Health Services
Department of Human Resources

Questions: (1) How can a law enforcement officer determine the proper place for and cause detention of a respondent prior to an involuntary commitment hearing?

(2) During the preliminary stages of an involuntary commitment proceeding, may a magistrate or clerk, acting under G.S. 122-58.4, designate a temporary overnight place of custody with provision for subsequent removal to a regional facility for examination?

Conclusions: (1) The prehearing detention authorized by G.S. 122-58.4 should be effected in accordance with the custody order of the magistrate or clerk; if the custody order

lacks specificity, the provisions of G.S. 122-58.4 and the local plan formulated for the use of mental health facilities will control.

(2) A magistrate or clerk may designate a temporary overnight place of detention with provision for subsequent removal to a regional mental health facility for examination in the case of a respondent being processed for involuntary commitment when this course of action is rendered necessary by existing circumstances and will not result in the exceeding of time limitations for the examination as prescribed by G.S. 122-58.4.

G.S. 122-58.4 requires prompt examination of a respondent who is being processed under the involuntary commitment statutes. Rigid time requirements are imposed so that the respondent must be taken into custody within 24 hours of the execution of the custody order by the magistrate or clerk, and he must be transported to a proper place for examination immediately, but, in any event, within 48 hours after custody has been assumed. The law enforcement officer receiving the custody order is the individual who is responsible for getting the respondent to the right place within the prescribed time; apparently, some question has arisen as to where this law enforcement officer can look for guidance when a physician is not immediately available.

The statute requires use of a community mental health facility as the place of detention if such is available. Otherwise, the law enforcement officer ". . . may cause the detention of the respondent, under appropriate supervision, in the respondent's home, in a general hospital or in a regional mental health facility, but not in a jail or other penal facility." If the magistrate or clerk has specifically directed a place of detention, that order should be followed if possible; if, due to unexpected developments or unknown factors arising after the issuance of the order, the place specified appears inappropriate to the law enforcement officer, then he should so

apprise the magistrate or clerk and secure additional instructions.

Where, due to insufficient information at the time of issuing the custody order or for other reasons, no specific place is specified in the custody order, the local plan dealing with mental health facilities should be looked to for guidance as to the proper place of detention. G.S. 122-58.16 requires the formulation of such a plan by community mental health facilities and area mental health programs. These plans are arrived at " . . .after consultation with local court officials and the local medical society" and approval thereof by the Division of Mental Health Services is required. Since the statute makes it very clear that the desired place of detention, where available, is a community mental health center, provision for alternate courses of action, absent a community health center, should be included in the local plan for the guidance of judicial and law enforcement personnel. In view of the requirement for consideration by all involved parties prior to formulation of the local plan, the provisions therein should conform to the requirements of G.S. 122-58.4 but be tailored to meet the needs of the local mental health personnel, the judiciary and the law enforcement officers.

As to Conclusion No. 2, prompt examination of the respondent is required and the time limits for the required actions leading up to the examination are absolute mandates. However, clearly there may be situations where, due to prevailing circumstances, the appropriate course of action will be local overnight detention, under authorized conditions, despite the fact that a satisfactory examination may not be obtained locally. In these situations, so long as the mandatory time limit for examination of the respondent can still be met, it would appear that the magistrate or clerk is vested with discretion to enter an order directing local temporary custody and late transfer to a regional mental health facility.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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17 July 1974

Subject: Health; Regulation of Sewage Disposal in Foodhandling and Lodging Establishments; Construction of G.S. 72-46, G.S. 130-160 and G.S. 143-215

Requested by: Mr. Stacy Covil, Assistant Head
Sanitation Branch
Sanitary Engineering Section
Division of Health Services
Department of Human Resources

Question: In light of the authority of the Environmental Management Commission to promulgate regulations and standards concerning sewage disposal systems and discharge therefrom under G.S. 130-160 and G.S. 143-215, may the Commission for Health Services also promulgate regulations concerning sewage disposal in foodhandling and lodging facilities under G.S. 72-46?

Conclusion: The Commission for Health Services may prepare and the Department of Human Resources may enforce more stringent regulations concerning sewage disposal in foodhandling and lodging facilities where such regulations are deemed necessary to protect the public health.

G.S. 130-160 provides in substance that any person owning or controlling a residence, place of business or place of public assembly shall provide an approved sewage disposal system. A system with less than three thousand gallon capacity and not discharging into the surface waters is subject to approval according to regulations promulgated by the Commission for Health Services; a system with more than three thousand gallon capacity is subject to approval according to regulations promulgated by the Environmental Management Commission. The Environmental Management

Commission is authorized under G.S. 143-215 to adopt effluent standards and limitations concerning discharge into all surface waters.

G.S. 72-46 provides in substance that the Commission for Health Services shall promulgate regulations concerning the sanitation of foodhandling and lodging establishments. The section provides that a permit must be obtained from the Department of Human Resources before any establishment may operate and that the permit may only be issued upon compliance with the regulations prepared by the Commission. A minimum grade of C is required for operation. The section sets forth certain items, including waste disposal, which shall be covered in the Commission's regulations. Section 6, Item 6, of the Rules and Regulations Governing the Sanitation of Restaurants and Other Foodhandling Establishments provides in part that "All toilet wastes shall be disposed of in a public sewer system, or in absence of a public sewer system, by a private sewage disposal system approved by the Commission for Health Services."

Applying established rules of statutory construction that statutes pertaining to similar matters are to be harmonized and that implied repeal of statutory provisions is not favored, it is the opinion of this Office that the authority of the Environmental Management Commission to adopt regulations and standards under G.S. 130-160 and G.S. 143-215 does not diminish the authority and the responsibility of the Commission for Health Services to adopt and the Department of Human Resources to enforce regulations designed for the protection of the public health in regard to sewage disposal systems in foodhandling and lodging establishments. Due to the importance of proper sanitation in such establishments, the Legislature has authorized and directed the Commission for Health Services to consider and regulate all aspects of proper sanitation. This specific authority and responsibility in insuring proper sanitation must be construed as a supplemental safeguard for protecting the public health in foodhandling and lodging establishments in addition to the regulations of the Environmental Management Commission under G.S. 130-160 and G.S. 143-215.

In light of possible concurrent jurisdiction of the Environmental Management Commission and the Commission for Health Services in promulgating regulations concerning sewage disposal systems in

foodhandling and lodging facilities, the Department of Human Resources, in enforcing the regulations of the Commission for Health Services, may evaluate a sewage disposal system and determine whether, regardless of the fact that the system has been found to satisfy the requirements of the Environmental Management Commission, the system satisfies the requirements of the Commission for Health Services. It is the opinion of this Office that the regulations of the Commission applicable to sewage disposal systems in foodhandling and lodging establishments may be more stringent than those of the Environmental Management Commission applicable to sewage disposal systems in general; but, in no event, may the Department of Human Resources issue a permit under G.S. 72-46 to an establishment which has not satisfied the applicable regulations, if any, of the Environmental Management Commission under G.S. 130-160 and G.S. 143-215. This conclusion necessarily follows from the determination that G.S. 130-160 and G.S. 143-215 impose minimum requirements of sanitation for sewage disposal systems and that G.S. 72-46 imposes supplemental requirements on foodhandling and lodging establishments. G.S. 72-46 provides that the Commission for Health Services may prepare rules concerning waste disposal, among other things, in determining the overall sanitation of the establishment; but G.S. 130-160 specifically provides that all places of business shall have a sanitary system of sewage disposal. It would be anomalous to conclude that an establishment, although failing to satisfy the specific mandate of G.S. 130-160 and G.S. 143-215, could nevertheless possess the level of sanitation demanded by G.S. 72-46.

Therefore, if the Office of Environmental Protection has issued a permit or temporary permit indicating compliance with G.S. 130-160 and G.S. 143-215, the Department of Human Resources may independently evaluate the sewage disposal system in determining the general sanitation of the foodhandling or lodging establishments. However, if the Office of Environmental Protection denies a permit or withdraws a temporary permit, the establishment cannot *ipso facto* satisfy the requirements to obtain a minimum grade of C.

Robert Morgan, Attorney General
Robert R. Reilly
Associate Attorney

17 July 1974

Subject: State Departments, Institutions, and Agencies; State Department of Youth Development; Infants and Incompetents; Medical Treatment for Students; Consent for Surgical Operations on Minor Students

Requested by: Mr. John R. Larkins, Commissioner
Office of Youth Development
Department of Social Rehabilitation and Control

Questions: Under present conditions where none of the facilities of the State Department of Youth Development have a medical doctor at the facility but where each has a contractual relationship with a medical doctor for medical services to its students:

(1) Who is authorized to consent to a non-emergency surgical operation on a minor student?

(2) Who is authorized to consent to an emergency surgical operation on a minor student?

(3) What authorization is needed for non-surgical medical treatment given to a minor student?

(4) May effective general consent be obtained in advance from parents, guardians, relatives or legal custodians for all necessary medical treatment and surgery which may be given to a minor student in the future?

Conclusions: Under the circumstances described in the questions:

(1) Consent for a non-emergency surgical operation on a minor student should be obtained from a responsible member of his family, guardian, or one having legal custody. If such type of individual qualified to give this consent cannot be found, then consent should be obtained from the local health director of the area where the facility is located.

(2) Consent for an emergency surgical operation on a minor student should be obtained from the superintendent of the institution and the medical doctor under contract for medical services to students of the facility.

(3) The need for non-surgical medical treatment given to a minor student should be determined by the medical doctor under contract to the facility, and, upon such determination, no further consent is necessary.

(4) General consent from parents, guardians, relatives or legal custodians obtained in advance for surgical operations on minor students would not be effective to authorize future surgical operations. In view of conclusion (3), general advance consent for future non-surgical treatment of minor students is not prohibited nor would it be necessary for the administration of non-surgical treatment by the medical doctor under contract.

G.S. 134-26, ratified in 1971, provides:

> "§134-26. *Providing necessary medical and surgical treatment for students.* - The State Department of Youth Development is authorized and directed to

> provide, through licensed physicians and surgeons, such medical and surgical treatment as is necessary to preserve the life and health of the students. The medical staff of any school, institution, or agency, under the management and control of the State Department of Youth Development, is hereby authorized to perform or cause to be performed, by competent and skillful physicians or surgeons, medical treatment or surgical operations upon any student when such operation is necessary for the physical health of the student. Provided, that no operation shall be performed except as authorized in G.S. 130-191."

As a result, in order to resolve the question regarding non-emergency surgery, it is necessary to examine G.S. 130-191. As found in the 1974 Replacement Volume 3B of the North Carolina General Statutes, that section makes the following provisions for non-emergency surgery on minor students:

> "No such operation shall be performed . . ., if the inmate be a minor, without the consent of a responsible member of his family, a guardian, or one having legal custody of such minor . . . In any event in which a responsible member of the inmate's family, or a guardian for such inmate, cannot be found, as evidenced by the return of a registered letter to the last known address of the guardian or responsible relative, then the local health director of the area in which the hospital or institution is located shall be authorized to give or withhold, on behalf of the inmate, consent to the operation."

This language unequivocally demonstrates a legislative intent to secure the consent for non-emergency surgery from the parents, guardian, or a person having custody where it is reasonably possible. As an alternative, when efforts to find such person in the manner prescribed have been unsuccessful, the local health director is vested with the responsibility for resolving the issue of whether the operation should be performed and is authorized to give the required consent.

Paragraph 2 of G.S. 130-191 covers the situation where emergency surgery on a minor resident is involved but it is impossible to obtain the timely consent of "a responsible member of his family, guardian, or one having legal custody." In that situation " . . . the decision to proceed with the operation shall be made by the chief medical officer and the superintendent of the institution with the advice of the medical staff of the institution." Clearly, under existing circumstances, substituting a medical doctor under contract for a non-existent chief medical officer and his staff would fall squarely within the ultimate intent of the legislators, i.e., obtaining the approval of the superintendent of the institution and a professionally qualified medical doctor. This section and this rationale would appear to be similar to that involved in Article 1, Chapter 90, of the North Carolina General Statutes, dealing with the general treatment of all minors in this State. In view of the specific language of G.S. 130-191 and the limitations of its area of application, its provisions should control in the event of any conflict or inconsistencies with the provisions of Article 1 of Chapter 90.

So too, the intent of the legislators as expressed in G.S. 134-26 would also be implemented by equating a medical doctor under contract to the "medical staff" described in that section. Thus the medical doctor having a contractual relationship with the facility would be the determiner of the need for non-surgical treatment of a minor student. Of course, responsibility rests upon the personnel at the facility for insuring that any minor student displaying symptoms of illness, disease, etc., receives appropriate medical examination for the purpose of determining the need for medical treatment.

Finally, the specificity of the language of G.S. 130-191, together with the limitations imposed by G.S. 134-26, precludes the deriving of any true authorization for future surgery from a general consent previously obtained from responsible adults. As to non-surgical treatment, in view of the statutory provisions governing this situation, such prior consent is not required as a prerequisite for obtaining appropriate treatment. However, this general consent to non-surgical treatment is not prohibited and might serve at least a psychological purpose in reassuring the responsible adults that the minor student will receive proper medical treatment, or in deterring future attempts to institute litigation because of medical treatment which has been given.

It is noted that a prior opinion of this Office addressed to Dr. John S. Chamblee, Rocky Mount City Health Director, dated 1 July 1969, and published at 40 N.C.A.G. 674 has dealt with these questions. In view of the language of the present statutes governing this situation, that prior opinion is hereby superseded with this opinion and the advice given in the prior opinion should no longer be followed.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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19 July 1974

Subject: Mental Health; Involuntary Commitment; Authority of Attending Physician to Determine Place of Pre-Hearing Custody

Requested by: Mr. M. G. Boyette
County Attorney
Moore County

Question: May the attending physician in a community mental health center, acting solely at his own discretion, transfer to a regional mental health facility a respondent in an involuntary commitment proceeding who is in pre-hearing detention at the center?

Conclusion: An attending physician at a community mental health center, acting solely at his own discretion, may not transfer to a regional mental health facility a respondent in an involuntary commitment proceeding who is in pre-hearing detention at the center.

This Office has recently had occasion to examine the problems attendant to the pre-hearing detention of respondents in involuntary

commitment cases, including the authority to determine a proper place for detention. See opinions of the Attorney General to Dr. N. P. Zarzar, Director, Division of Mental Health Services, Subjects: Determination of Place of Detention Prior to Commitment Hearing; Supervision and Treatment of a Respondent Detained in a Community Mental Health Center or Regional Mental Health Facility; and Return of Respondent to Mental Health Facility for Treatment Pending Commitment Hearing, all three opinions dated July 10, 1974. The conclusions arrived at in these opinions were predicated to a very great extent upon some of the desired results which the General Assembly obviously intended to achieve by ratifying the new involuntary commitment statutes–i.e., insuring the minimum amount of pre-hearing restraint commensurate with the individual case, avoiding any requirement for excessive transportation of the respondent as a part of the commitment proceedings, accessibility of the respondent to his lawyer, and placing the proceedings squarely within orderly judicial proceedings so that the rights of all parties can be protected. The same basic considerations are involved in arriving at the conclusion voiced here.

If the order of the magistrate or clerk specifies the place of detention and a change therein becomes imperative, the judicial officer who issued this order should be contacted, informed of the situation, and requested to alter the detention order. If no place of detention is specified in the order, and the order does not grant the detaining facility discretion in the matter, then the local plan dealing with mental health facilities formulated under G.S. 122-58.16 should afford proper guidance on the matter of transfer of the respondent.

The controlling statutes speak clearly regarding the authority of a qualified physician attending the respondent to release him from any detention prior to his hearing. Thus, if the physician finds that the respondent is not mentally ill or inebriate and not imminently dangerous to himself or to others, then he may release him from such detention until the time of his commitment hearing. See G.S. 122-58.6. However, if the attending physician determines that the respondent should be detained, he is not authorized, on his own, to transfer the respondent to a regional mental health facility in contravention of the order of the magistrate or clerk or contrary to the provisions of the local mental health plan. Although authority is vested in the attending physician to administer appropriate,

reasonable medication and treatment to a respondent being detained, in view of the specific statutory language dealing with the place of detention, this authority does not extend to an unauthorized transfer of a respondent in pre-hearing detention.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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5 August 1974

Subject: Mental Health; Mentally Ill or Inebriate Persons; Patients' Rights; Contraband; Search and Seizure; Regulation of Parking; Assault

Requested by: Dr. Pedro Carreras, Assistant Director
John Umstead Hospital

Questions: (1) May the Director of a State mental institution confiscate contraband articles in possession of a patient at such institution?

(2) May the Director of a State mental institution search a patient and his possessions for articles that may be dangerous, not only to the patient, but to other patients and staff as well, when reliably informed that a patient has such articles in his possession?

(3) What degree of force may be used by a State mental health hospital staff member to defend himself when assaulted by a violent and aggressive patient?

(4) Is John Umstead Hospital authorized to establish parking areas for patients and enforce use of such areas?

Conclusions:

(1) The Director of a State mental institution may confiscate contraband articles in possession of a patient at such institution.

(2) The Director of a State mental institution may search a patient and his possessions for articles that may be dangerous not only to the patient but to other patients and staff as well, when reliably informed that a patient has such in his possession; however, where criminal prosecution is indicated and where it does not appear that the situation is so emergent that irremediable harm would result from delay, a search warrant should be obtained prior to search.

(3) A mental health hospital staff member may use only that degree of force necessary to repel and secure a violent and aggressive patient.

(4) John Umstead Hospital may establish parking areas for patients and enforce use of such areas.

The mental hospital to which a mentally ill or inebriate person is committed pursuant to Article 5A of Chapter 122 of the General Statutes has custody of such person and is responsible for appropriate supervision during the commitment period. See G.S. 122-58.8(b). G.S. 122-55.2 provides that a patient has a right to keep and use his own clothing and personal possessions and to have access to individual storage space for his private use. However, nothing contained therein gives the patient a right to have in his possession articles that are imminently dangerous to himself or others or property, the possession of which is made a criminal offense under the laws of this State, i.e., concealed weapons, illegal drugs, etc. The Department of Human Resources has jurisdiction over all the State's mental hospitals, G.S. 122-1, and the Commission for Mental Health Services is authorized to establish

rules and regulations governing the admission of persons to such institutions. G.S. 122-3. The Department may, by proper regulations, require inventorying and proper storage of such articles as may be dangerous but not otherwise illegally possessed.

The authorities and case law in this State concerning search and seizure deal generally with actual or suspected criminal law violations and evidence obtained by an unlawful search and seizure may not be introduced at the trial of the accused.

A warrant may be issued by any justice, judge, clerk or assistant or deputy clerk of any court of record, or any magistrate of the General Court of Justice to search for any contraband, evidence, or instrumentality of crime upon finding probable cause for the search. G.S. 15-25(a). In order to obtain a search warrant, it is necessary that an affidavit under oath establish the basis for the finding of probable cause for its issuance. G.S. 15-26. Further, no evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial. G.S. 15-27(a).

This Office is of the opinion that contraband articles, i.e., weapons, illegal drugs, etc., in the possession of a patient at a mental institution may be seized by the Director of such institution, particularly where the retention of such would constitute a danger to the safety not only of the particular patient but other patients and the staff as well. This applies to such articles in a patient's possession at the time of his admission and at all times thereafter during his detention at the hospital.

Further, if there is reasonable ground to believe that a patient has such articles in his possesion, this information may be conveyed by proper affidavit to a magistrate or other person authorized to issue a search warrant and such magistrate or other officer may, if convinced, issue such warrant. Where criminal prosecution is anticipated, obtaining a search warrant will tend to make amply sure that the objects seized will be admissible at trial. However, in situations where it appears probable that bodily injury or property destruction, etc., will result from the delay, the better cause may well be to conduct the search without benefit of a warrant; hence, the conclusions reached in Questions (1) and (2).

The right of self-defense provides the answer to Question (3). A person may use such force to repel an assault as is reasonably or apparently necessary to protect himself from death or great bodily harm. The reasonableness of the apprehension is to be determined by the jury in accordance with the facts and circumstances as they appeared to defendant at the time of assault. See *State v. Francis*, 252 N.C. 57, 112 S.E. 2d 756 (1960). The force used must not be excessive or disproportionate to the force it is intended to repel and the question of excessive force is ordinarily for determination of the jury. *State v. Ritter*, 239 N.C. 89, 79 S.E. 2d 164 (1953). Thus, a mental hospital staff member may, if assaulted by a violent and aggressive patient, use such force as is necessary to defend himself; however, great care should be exercised to assure that the force used to repel the assailant is not excessive under the circumstances.

As to Question (4), G.S. 122-16.1 and G.S. 122-95 appear to be dispositive. Under G.S. 122-16.1(b), the Commission for Mental Health Services is authorized to establish parking areas on the grounds of mental institutions. Under G.S. 122-95, the North Carolina Department of Human Resources is authorized to make rules and regulations and to adopt such ordinances as may be necessary for the better administration of John Umstead Hospital and is authorized in particular to establish parking areas. We are of the opinion that this authority is sufficiently broad to enable John Umstead Hospital to designate State-owned areas as patient parking lots and to require patients having automobiles at the institution to park their automobiles in those areas.

Robert Morgan, Attorney General
Parks H. Icenhour
Assistant Attorney General

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12 August 1974

Subject: Social Services; Closed-End Budget for Financing Programs of Public Assistance at the County Level; Chapter 1418, Session Laws 1973, Second Session; Legality of Social Services Commission Proviso that for

Fiscal 1974-75 Counties Will Be Required to Provide Adult Services, Under More Liberal Eligibility Standards, Only to the Extent the County Budgets Permit

Requested by: Mr. Robert Ward
Deputy Director
Division of Social Services
N. C. Department of Human Resources

Question: May the Social Services Commission adopt a proviso that for fiscal 1974-75 counties will be required to provide adult services, under more liberal eligibility standards, only to the extent their budgets permit?

Conclusion: The Social Services Commission may adopt a proviso that for fiscal 1974-75 counties will be required to provide adult services, under more liberal eligibility standards, only to the extent their budgets permit.

At the June 14, 1974, meeting of the North Carolina Social Services Commission approval was given to raising the maximum level of income for eligibility for potential recipients of adult services, with the proviso that for fiscal 1974-75 counties will be required to provide such services only to the extent their budgets permit. The focal issue in this instance is the possibility that certain applicants for adult services who are otherwise eligible under the financial standard adopted by the Social Services Commission may be deprived of such services by virtue of the fact that the county has exceeded its budgetary maximum for these programs for fiscal 1974-75. Such a result would run afoul of 45 CFR §222.5 and 45 CFR §220.15:

> "All of the services (adult) contained in the State plan must be available, accessible, and provided with reasonable promptness to *all* eligible persons needing the services." 45 CFR §222.5. (Emphasis supplied)

"The State plan:

> (a) Must assure that responsibility is assumed for the provision of services (certain adult services under Title IV-A of the Social Security Act) to *all* appropriate persons receiving aid and others in the home whose needs were considered in determining eligibility for such aid, as called for under each of the requirements in §§ 220.16- 220.25..." 45 CFR §220.15. (Emphasis supplied)

Such a result would also run afoul of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

However, Chapter 1418 of the 1973 Session Laws, Second Session, 1974, established the "State Public Assistance Contingency Fund" from State appropriations to provide additional funds to the counties for all programs of public assistance in fiscal year 1974-75 in the event that expenditures in such county programs exceeded the approved budget of total county funds required to finance each program of public assistance within that county for fiscal year 1974-75. Consequently, when the aforementioned proviso is considered in connection with the provisions of Chapter 1418, it becomes evident that all persons eligible for adult services in fiscal 1974-75 will, in fact, receive such services, only the costs thereof will be assumed in one of the following manners:

> 1. By the individual county under its budget for adult services until that budget has been exhausted at which time the county may, with the approval of the Secretary of Human Resources or his representative, transfer county funds from another public assistance program to the adult services programs. See Section 5 of Chapter 1418.
>
> 2. When the county's budget for all public assistance programs is exhausted, the expense of these programs in the county for fiscal year 1974-75 will be defrayed by an allotment from the "State Public Assistance Contingency Fund," made to the county at any time during the fiscal year by the Secretary of Human

Resources when satisfied of the county's need for such allotment. See Section 2 of Chapter 1418.

In sum, Chapter 1418 has cured the proviso adopted by the Social Services Commisssion on June 14, 1974, of significant constitutional and statutory defects. Therefore, the proviso is legally sanctionable at this time.

Robert Morgan, Attorney General
William Woodward Webb
Assistant Attorney General

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12 August 1974

Subject: Mental Health; Commitment Rehearings; Waiver of Notification of Time and Place of Rehearing

Requested by: Mr. J. Laird Jacob, Jr.
Special Counsel
Broughton Hospital

Questions: (1) Is it required that the clerk's notice of rehearing pursuant to Article 5A, Chapter 122, North Carolina General Statutes, in an involuntary commitment case be actually served upon the respondent and the appropriate special counsel?

(2) May the special counsel in an involuntary commitment case involving an indigent respondent:

(a) accept service of the clerk's notice of rehearing (AOC-L Form 406) for the respondent?

(b) waive the service of the clerk's

notice of rehearing (AOC-L Form 406) upon the respondent?

(c) waive service of the clerk's notice of rehearing (AOC-L Form 406) upon the respondent and special counsel?

Conclusions:

(1) Absent appropriate waiver of service, or consent to non-service, G.S. 122-58.11(a) requires actual service of the clerk's notice of rehearing in an involuntary commitment case upon both the respondent and the special counsel.

(2) The special counsel in an involuntary commitment case involving an indigent respondent:

(a) may accept service of the clerk's notice of rehearing (AOC-L Form 406) for the respondent;

(b) waive service of the clerk's notice of rehearing (AOC-L Form 406) upon the respondent;

(c) waive service of the clerk's notice of rehearing (AOC-L Form 406) upon both the respondent and special counsel.

Under the present involuntary commitment statutes an initial period of involuntary commitment may not exceed ninety (90) days. Where continued involuntary commitment is indicated, a rehearing must be held to determine the need for continuation beyond the end of the initial period. G.S. 122-58.11(a). The second period of involuntary commitment cannot exceed one hundred and eighty (180) days, and, if continuation beyond that period appears necessary, the respondent must be afforded the opportunity of annual rehearings. G.S. 122-58.11(d),(e).

G.S. 122-58.11(a), with reference to the first rehearing, provides the clerk "...shall notify the respondent and his counsel of the time and place of the rehearing." Other provisions specify that the same procedures appertain to rehearings as those governing initial hearings and that respondents have the same rights as they have at initial hearings. G.S. 122-58.11(c),(e). On the topic of original hearings, G.S. 122-58.5 stipulates:

> "Notice must be given at least 48 hours in advance, unless waived by counsel for the respondent."

Further indicative of the legislator's ideas as to the role of counsel, he is authorized to waive the presence of any respondent at a hearing (G.S. 122-58.7(d)), and the right to rehearings after the first rehearing may be waived when "...the respondent through his counsel" files a written waiver of such right (G.S. 122-58.11(e)).

In order to fully protect the rights of indigents in the mental health facilities, the present statutes authorize the appointment of special counsel at each regional psychiatric facility. These special counsel are required "...to represent at rehearings under this Article all indigent respondents" and their authority extends even to the initial determination of indigency. G.S. 122-58.12(a).

As the necessary implementation of the statutory requirement for notice, a particular form (AOC-L Form 406) has been devised and is utilized for the purpose of effecting service upon respondents and special counsel. In accordance with normal practice, these notices are being served upon the respondents and special counsel by law enforcement officers. Apparently the present questions arose from a desire to obviate the monetary costs and man-hours expended in preparation and service of these notices where it is the desire of special counsel to waive these formalities.

In view of the language used throughout Article 5A, it is manifest that the General Assembly intended to vest considerable discretion and authority in the hands of the special counsel so as to enable them to represent the respondents' best interests. Thus, it would appear that the actions described in Conclusion (2) are permitted.

It is contemplated, of course, that where formal notice is waived, informal notification adequate to amply protect a respondent's rights will be made and that appropriate recordation thereof will be available to substantiate the absence of a deprivation of the rights of any respondent. In addition, Conclusion (2) is limited to a situation where only special counsel is involved and there is no individual counsel of record. Where there is individual counsel of record who is still representing a respondent, undoubtedly such individual counsel would be authorized to waive or accept service in the same fashion as special counsel. However, in that type of situation, special counsel would not be authorized to take these actions on his own.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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12 August 1974

Subject: Mental Health; Involuntary Commitment; Propriety of the "Qualified Physician" Acting As Physician In Charge of Treatment

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Question: Can a duly licensed medical doctor who is a full time mental health center staff member act as the qualified physician responsible for committing to the mental health center inpatient unit a patient whom he has appropriately evaluated to be mentally ill or inebriate, and, at the same time, be the primary medical physician in charge of this person's treatment in the center's inpatient unit without violating the legal rights of the patient or the physician?

Conclusion: There is no legal impediment to, or violation of the legal rights of any party resulting from, the qualified physician responsible for committing a patient to the mental health center inpatient clinic also acting as the primary medical doctor in charge of the patient's treatment at the center's inpatient unit.

In view of the medicolegal approach to handling involuntary commitment cases in North Carolina, Article 5A of Chapter 122 of the General Statutes places considerable emphasis on the role of the "qualified physician" in involuntary commitment proceedings. He is responsible for determining initially if the respondent meets the criteria for involuntary commitment and whether pre-hearing restraint is necessary. As a practical matter, it would appear that his testimony is normally the most vital -- and probably controlling -- evidence presented upon the subject of need for commitment and treatment.

These facts, however, do not serve to incapacitate the qualified physician from acting as the physician in charge of the respondent's treatment when the respondent becomes an inpatient as the result of the involuntary commitment proceedings. The basic objective in involuntary commitment proceedings is to secure proper treatment for individuals who need such treatment. In other words, the motive behind these proceedings is a curative one rather than a punitive one. Thus, the very act of commitment, where appropriate, is an integral step in the proper therapeutic program for the respondent. The qualified physician is acting in the best interest of the respondent at the time of the commitment proceedings just as he is acting in the patient's best interest in administering inpatient treatment to him. As a result, there is no legal problem presented by the medical doctor performing the dual functions described.

Two additional comments, not legal in nature, are in order on this subject. The functioning of the physician in the commitment proceedings may, in some instances, adversely affect the rapport desired between the physician and the patient and there may be some deterioration of the patient's confidence in the physician as a result of what the respondent may think is derogatory testimony.

Conversely, though, it is obvious that when the qualified physician and the treating physician are one and the same, it is far more likely that the treatment rendered will be compatible with that envisioned at the time commitment for treatment is judicially determined to be appropriate. These, however, are administrative matters with no legal connotations which must be resolved in view of the resources available at the individual facility.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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12 August 1974

Subject: Prisons and Prisoners; Work Release; Parole Commission

Requested by: Mr. J. Mac Boxley
Chairman
Parole Commission

Questions: (1) Is the Parole Commission responsible for granting work release privileges to persons committed to the Division of Prisons?

(2) Is responsibility for granting work release privileges for persons sentenced to imprisonment for less than five years reserved in the Division of Prisons?

Conclusions: (1) Yes

(2) No

Chapter 1262 of the Session Laws of 1973 (Second Session 1974), entitled "An Act to Further Effectuate the Reorganization of State Government #4.", provides in Sec. 8(b), to be codified as G.S. 143B-266, that:

> "*All releasing authority previously resting in the Commissioner and Commission of Correction* with the exception of authority for extension of the limits of the place of confinement of a prisoner contained in G.S. 148-4 is hereby transferred to the Parole Commission. *Specifically, such releasing authority includes work release (G.S. 148-33.1)* . . .provided the individual considered for work release . . . shall have been recommended for release by the Secretary of Correction or his designee." (Emphasis added)

Thus, the General Assembly has unequivocally assigned to the Parole Commission, effective July 1, 1974, the responsibility for granting of work release privileges to persons committed to the Division of Prisons.

G.S. 148-33.1 authorizes work release and subsections (a) and (b) made a distinction in work release granting procedures to persons sentenced to a term not exceeding five years. Formerly, G.S. 148-33.1(a) did not require Board of Parole authorization for work release in the event the sentencing court had recommended work release to a person sentenced to a term not exceeding five years. If the term exceeded five years, Parole Board approval was required before the Department of Correction could place the individual on work release. G.S. 148-33.1(b). In the absence of G.S. 148-33.1 there would be no basis for granting work release privileges to any inmate, regardless of the length of sentence.

It would undoubtedly ease the work load of the Parole Commission if the Division of Prisons could treat work release privileges for inmates sentenced to less than five years as an extension of the limits of confinement under G.S. 148-4. Unfortunately, there is no way to bifurcate work release into under and over five-year categories so as to avoid the language of G.S. 143B-266 vesting "All releasing authority . . . Specifically . . . work release (G.S. 148-33.1) . . ." in the Parole Commission.

There would be no authorization for release privileges were it not for G.S. 148-33.1. Therefore, the conclusion is inevitable that the Parole Commission is exclusively responsible for granting work

release privileges to all persons in the custody of the Division of Prisons, regardless of whether or not their sentences are less than or more than five years.

Robert Morgan, Attorney General
Jacob L. Safron
Assistant Attorney General

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13 August 1974

Subject:	Health; Solid Waste Disposal; Chapter 130, Article 13B; G.S. 153A-292; Applicability of Local Ordinances
Requested by:	Mr. R. Kason Keiger Town Attorney Kernersville
Question:	Does Article 13B of Chapter 130 of the General Statutes, authorizing the Department of Human Resources to establish a statewide solid waste disposal system, preempt the field of legislation and bar the enactment and enforcement of county zoning ordinances on the subject?
Conclusion:	Article 13B does preempt the field of legislation and bar the enactment and enforcement of county zoning ordinances on the subject; but the boards of county commissioners may, pursuant to G.S. 153A-292, enact ordinances governing solid waste disposal facilities established and operated by the boards.

Chapter 153A, Article 18, Part 3, of the General Statutes pertains to county zoning authority. G.S. 153A-340 is the general grant of power which authorizes counties to enact zoning restrictions for the

purpose of promoting health, safety, morals or the general welfare. G.S. 153A-346 provides that if the regulations made under the authority of Part 3 impose higher standards than required under other statutes, ordinances and regulations, the regulations made under the authority of Part 3 control; if not, the other statutes, ordinances and regulations control.

Chapter 130, Article 13B, of the General Statutes authorizes and directs the Department of Human Resources "to engage in research, conduct investigations and surveys, make inspections, and establish a statewide solid waste disposal program." The Department shall "(d)evelop a comprehensive program for implementation of safe and sanitary practices for the disposal of solid waste throughout the State." The Commission for Health Services "shall have authority to provide standards for the establishment, location, operation, maintenance, use and discontinuance of solid waste disposal sites and facilities."

It is well established in this State that "(m)unicipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general law of the State. In case of conflict the ordinance must yield to the State law." *Davis v. Charlotte*, 242 N.C. 670, 89 S.E. 2d 406 (1955).

It is also well established that "(w)here a field of general legislation is wholly taken over by the State, local zoning regulations or ordinances...may not interfere with its supreme authority in that field." C. J. S., *Zoning*, s.10, p. 693. Thus, the question arises whether resolution of this matter rests upon a determination of conflict between State law and regulation and a county ordinance or whether resolution rests upon a finding of State preemption in the field of solid waste disposal.

In *Petition of Hilovsky*, 108 A. 2d 705, 179 Pa. 118 (1954), the Pennsylvania Supreme Court addressed the question whether a zoning ordinance may prohibit the sale of intoxicating liquor by a properly licensed hotel. The Court concluded that "(i)f it be argued that dispensing of liquor has a reasonable relation to police power, the answer is that even so municipalities may not invade the field of regulation which the State legislature has completely filled by its comprehensive liquor control act.... A municipality may not in

the guise of a zoning ordinance regulate the business of dispensing liquor." (at 706). In *Staley v. Winston-Salem*, 258 N.C. 244, 128 S.E. 2d 604 (1962), the North Carolina Supreme Court considered a Winston-Salem ordinance which purported to regulate the sale of beer or wine. The Court reviewed the history of extensive State legislation in the field and concluded that "(t)o interpret it (the State law) so as to permit local communities to override and set at nought the conclusions reached by the State Board (concerning licensing) might well reproduce the condition deplored by the 1945 Legislature. Local ordinances cannot override statutes applicable to the entire State. (Citation omitted). Petitioners' right to operate the restaurant being conceded, the zoning ordinance could not set at nought a statewide statute permitting the sale of wines in such restaurants. Such sales are a permitted part of authorized business." (at 248 and 249).

An analogy between liquor regulation and solid waste disposal regulation is appropriate. In *Staley v. Winston-Salem, supra*, the Court found clear legislative intent of State preemption of liquor regulation; G.S. 130-166.18(1) clearly directs the Department of Human Resources to develop a comprehensive program throughout the State for regulation of solid waste disposal. Therefore, it is the opinion of this Office that Article 13B of Chapter 130 preempts the field of solid waste disposal regulation and bars the enactment and enforcement of county zoning ordinances on the subject which are in conflict or inconsistent with State regulations.

It should be noted that nothing herein is intended to suggest that local zoning ordinances may not classify land to permit or prohibit use as a landfill. However, once land is appropriately classified, establishment, location, operation, maintenance, use and discontinuance of solid waste disposal sites and facilities are not subject to zoning regulations.

The General Statutes do confer specific authority on counties to regulate by ordinance the removal, disposal, storage, collection, transportation and use of solid waste and the use of solid waste disposal facilities. G.S. 153A-132.1 authorizes a board of county commissioners to enact ordinances governing the removal and disposal of solid waste in the rural area of the county beyond municipal corporate limits. G.S. 153A-136 provides that a county

may by ordinance regulate "the storage, collection, transportation, use, disposal, and other dispostion of solid wastes." The broad language is limited by an enumeration of specifics thereafter. The section proceeds to confer upon the counties the authority to regulate and license "persons wishing to commercially collect or dispose of solid wastes." Subsection (b) thereof states that the county ordinances shall be "consistent with and supplementary to" the rules and regulations of the Commission for Health Services.

G.S. 153A-292 authorizes the board of county commissioners to establish and operate solid waste collection and disposal facilities beyond municipal corporate limits. The section states that "(t)he board may by ordinance regulate the use of such garbage, refuse, and solid waste disposal facilites; the nature of the solid wastes disposed of therein; and the method of disposal." Prior to the revision of Chapter 153 of the General Statutes by 1973 Session Law Chapter 822, the authority of the boards of county commissioners to regulate collection and disposal of garbage was contained in Article 22 of Chapter 153. Article 22 did not contain a provision similar to the one in G.S. 153A-292, quoted above. The revision of Chapter 153, effective February 1, 1974, was enacted subsequent to that of Article 13B of Chapter 130. The question is what effect the above-quoted provision has on the mandate contained in G.S. 130-166.18 for the Department of Human Resources to develop a statewide program for solid waste disposal.

It is an elemental rule of statutory construction that statutes pertaining to similar matters are to be harmonized and that each statute is to be given its full effect. As previously stated, it is clear that the Legislature intended to establish a comprehensive statewide program for solid waste disposal. It is also clear that the Legislature in G.S. 153A-292 authorized the boards of county commissioners to enact ordinances concerning the use of solid waste disposal facilities established and operated by the boards.

In G.S. 130-17, local boards of health are authorized to adopt more, but not less, stringent rules and regulations to protect and advance the public health where a peculiar local condition or circumstance so requires. As previously mentioned, G.S. 153A-346 provides that where county zoning ordinances and other statutes and ordinances conflict, that which provides the higher standard prevails. Although

these two statutes are not applicable to the question under discussion, they indicate legislative intent in similar circumstances.

Therefore, it is the opinion of this Office that the clear authority of the boards of county commissioners to enact ordinances pertinent to solid waste disposal systems under G.S. 153A-292 is limited by the statewide authority and responsibility of the Department of Human Resources to develop a comprehensive program for solid waste disposal. The boards of county commissioners may enact ordinances necessary for the establishment and operation of a facility but those ordinances involving sanitation practices and procedures may not be less stringent than the corresponding rules and regulations of the Commission for Health Services.

Robert Morgan, Attorney General
Robert R. Reilly
Associate Attorney

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16 August 1974

Subject:	Motor Vehicles; Driver's License; Limited Driving Privileges; Bond Forfeiture
Requested by:	Honorable E. E. Crutchfield District Court Judge
Question:	A person has been charged with driving under the influence and has not been tried, his case having been nol prossed upon entry of a judgment absolute on a cash bond. Since, pursuant to G.S. 20-24(c), such forfeiture is equivalent to a conviction, may a limited driving privilege be issued as provided in G.S. 20-179(b)?
Conclusion:	No.

G.S. 20-179(b)(1) reads in relevant part:

"Upon a first conviction only, the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family...."

The entry of a judgment absolute on a cash bond is not a trial nor would the judge entering such order be the trial judge as contemplated in this section.

It would appear that the proper procedure would be for the defendant to appear for trial on the charge. The bond forfeiture should be vacated in the event the defendant is tried and the court intends to issue the defendant a limited driving privilege to avoid conflict with G.S. 20-24(c).

Robert Morgan, Attorney General
William W. Melvin
Assistant Attorney General

16 August 1974

Subject:	Mental Health; Mentally Ill or Inebriate Persons; Transportation to State Hospital; Responsibility of County
Requested by:	Honorable Charles M. Johnson Clerk of Superior Court Montgomery County
Question:	Is transportation of a mentally ill or inebriate person to a State hospital the responsibility of the county?
Conclusion:	Transportation to or from a regional hospital outside the county is the responsibility of the county.

G.S. 122-58.14 provides for transportation of a respondent in an involuntary commitment proceeding to or from a clerk or magistrate, a qualified physician, a community mental health facility and a hearing shall be provided by the city or county depending upon whether the respondent is a resident of the city or a resident of the county outside the city limits. This statute provides in pertinent part as follows:

> "Transportation to or from a regional hospital outside the county, *for any purpose*, is the responsibility of the county, pursuant to G.S. 122-42." (Emphasis added)

G.S. 122-42 provides that the cost and expenses of conveying every patient to any hospital from any county or of removing him from the hospital to the county from which he was hospitalized or to the county of his residence when released shall be paid by the treasurer of the county of residence upon order of the board of county commissioners. This statute further authorizes a county, in proper instances, to bring an action to recover such cost.

Clearly the Legislature intended local transportation to be furnished by the city or county based upon the residence of the respondent. However, in language that is clear and in no manner ambiguous, responsibility for transportation of a respondent to a regional hospital outside the county is the responsibility of the county; hence, the foregoing conclusion.

Robert Morgan, Attorney General
Parks H. Icenhour
Assistant Attorney General

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16 August 1974

Subject: Facility Services; Licensing; Appeal From Denial or Revocation of License of a Home for the Aged and Infirm or a Family Care Home

Requested by: Mr. I. O. Wilkerson, Jr.
Director
Division of Facility Services
Department of Human Resources

Questions: In case of an appeal from denial or revocation of a license to operate a home for the aged and infirm or a family care home in this State, what official or agency is authorized to:

(a) determine the appropriate rules governing such appeal?

(b) furnish administrative support for processing such appeal?

(c) conduct a hearing on such appeal?

(d) determine the ultimate administrative action to be taken on such appeal?

Conclusions: In case of an appeal from denial or revocation of a license to operate a home for the aged and infirm or a family care home in this State:

(a) the Commission of Social Services prescribes the appropriate rules and regulations governing such appeal;

(b) the Division of Facility Services furnishes administrative support for processing such appeal;

(c) the Director, Division of Facility Services, or a person designated by him, conducts the hearing on such appeal;

(d) as to a home for the aged and infirm, the Division of Facility Services is responsible for ultimate administrative action taken on the appeal, after review of the transcript of the hearing by the Division. As to a family care home, the Division of Facility Services is responsible for ultimate administrative action taken on the appeal after review of the transcript of the hearing by the Social Services Commission. Final revocation of the license of a home for the aged and infirm can be made only after confirmation thereof by the Division of Facility Services and final confirmation of the revocation of a license of a family care home can be made only after confirmation thereof by the Social Services Commission.

Prior to the Organization Act of 1973, the State Department of Social Services was responsible for licensing the types of homes involved here, acting under rules and regulations adopted by the State Board of Social Services. The rules and regulations formulated by the Board charged the State Department of Social Services, in general, with administrative support of appeals processing, and required the State Commissioner of Social Services, or a person designated by him, to conduct appeals hearings. These rules further provided that ultimate determination on an appeal would be made by the State Department of Social Services after review of the transcript by the Department in the case of a home for the aged and infirm and after review of the transcript by the Board in the case of a family care home. Elsewhere in the rules, revocation of such licenses was prohibited except after final confirmation of the first type of license described by the Department and final confirmation of the revocation of the second type by the Board.

These rules and regulations, as originally promulgated, still contain the same language, and, by virtue of G.S. 143B-20, retain their legal efficacy.

Under the Organization Act of 1973, however, the position of Commissioner of Social Services and the Department of Social Services were abolished, while the Social Services Commission was established. See G.S. 143B-153 through G.S. 143B-156. Since the effective date of the Organization Act, the Social Services Commission is responsible for promulgation of rules and regulations for licensing and inspection of the homes under discussion (G.S. 143B-153), and the Department of Human Resources is statutorily responsible for the licensing and inspecting of these homes, acting under the rules and regulations of the Social Services Commission (G.S. 108-77).

Giving additional illumination upon the question of assumption of the responsibilities prescribed in the licensing rules and regulations, G.S. 143B-7 provides as follows:

> "§143B-7. *Continuation of functions.*--Each principal State department shall be considered a continuation of the former agencies to whose power it has succeeded for the purpose of succession to all rights, powers, duties, and obligations of the former agency. Where a former agency is referred to by law, contract, or other document, that reference shall apply to the principal State department now exercising the functions of the former agency."

There can be no question that the licensing rules and regulations involved here are "documents" within the context of G.S. 143B-7. Thus, applying this section to the present problems, it is clear that the responsibilities and authority previously vested in the Board of Social Services and the Department of Social Services devolved upon the Secretary of Human Resources and the Department of Human Resources, respectively, by virtue of the Organization Act.

Subsequent to the effective date of the Organization Act, the Secretary of Human Resources, acting under the authority of G.S. 143B-10, promulgated directives which created a Division of Facility Services within his Department, appointed a Director of this new Division, and transferred the licensing functions of the types of homes under scrutiny to this new Division. (See Department of

Human Resources directives numbers 11-73, 11-73 (Change 2), 11-73 (Change 3), and 14-73). These transfers and delegations of authority have resulted in the responsibilities and authorizations for actions on appeals as described in Conclusions (a) through (d) above.

Robert Morgan, Attorney General
William F. O'Connell
Assistant Attorney General

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16 August 1974

Subject: State Departments, Institutions and Agencies; Aid to the Blind, Chapter 111 of the General Statutes; Legal Authority of the Division of Services for the Blind to Enter into Contract with Manufacturer's Representative Under the Specific Exception in G.S. 111-27.1 Exempting the Executive Budget Act from Applicability to Such Contractual Arrangement.

Requested by: Mr. Stephen A. Johnson
Business Affairs Section
Division of Services for the Blind
Department of Human Resources

Question: May the Business Enterprises Program, Business Affairs Section of the Division of Services for the Blind enter into a contractual agreement with a manufacturer's representative/broker for the sale of products produced by the clients of the Self-Employment Program without violating the Purchases and Contracts Section of the Executive Budget Act?

Conclusion: The Business Enterprises Program, Business Affairs Section of the Division of Services

for the Blind may enter into a contractual agreement with a manufacturer's representative/broker for the sale of products produced by the clients of the Self-Employment Program without violating the Purchases and Contracts Section of the Executive Budget Act.

G.S. 111-27.1 provides that the Department of Human Resources is authorized to conduct activities "to promote the rehabilitation and employment of the blind, including the operation of various business enterprises suitable for the blind to be employed in or to operate." The Executive Budget Act which provides in G.S. 143-49 that the Director of Administration is to contract for "all contractual services and needs of State government, or any of its departments, institutions, or agencies; or to authorize any department, institution, or agency to purchase or contract for such services," applies "to the operation of such (blind) enterprises as to all appropriations made by the State to aid in the organization and establishment of such businesses." G.S. 111-27.1

However, there is a specific exception carved out of G.S. 111-27.1 respecting "(P)urchases and *sales of merchandise* or equipment, the payment of rents and wages to blind persons operating such businesses, *and other expenses thereof*, from funds derived from local subscriptions and *from the day by day operations*" which "shall not be subject to the provisions of law regulating purchases and contracts, or to the deposit and disbursement thereof applicable to State funds but shall be supervised by the Department of Human Resources." (Emphasis supplied)

Since this manufacturer's representative would be selling the merchandise of the clients of the Self-Employment Program and would derive his remuneration from the sales he is able to make, it is our opinion that a contract between the Division of Services for the Blind and this party for such services would fall within the purview of the exception embodied in G.S. 111-27.1. The compenstion of the manufacturer's representative can be considered an *expense* of the sale of the client's merchandise to be paid from the *day by day operations*, i.e., commission on the amount of sales produced. Accordingly, under G.S. 111-27.1 the contractual

arrangement sought need only be supervised by the Department of Human Resources and is not subject to the Purchases and Contracts Section of the Executive Budget Act.

Robert Morgan, Attorney General
William Woodward Webb
Assistant Attorney General

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28 August 1974

Subject: Mental Health; Voluntary Admissions; Involuntary Return, Involuntary Commitment, and Discharge of Escapee From A Treatment Facility

Requested by: Mr. R. J. Bickel
Assistant Director of Administration
Division of Mental Health Services
Department of Human Resources

Questions: If a patient who has been voluntarily admitted to a North Carolina treatment facility escapes from that facility:

(a) may he be involuntarily returned to that facility by a law enforcement officer upon request by the facility?

(b) may involuntary commitment proceedings be instituted against him during his absence, and, if so, by whom?

(c) if the escapee voluntarily returns to the facility but still desires to be discharged therefrom, do the usual provisions for release apply?

Conclusions: If a patient who has been voluntarily admitted to a North Carolina treatment

facility escapes from that facility:

(a) he may be involuntarily returned to that facility by a law enforcement officer upon the request of the facility, although there is no absolute requirement that his return be so requested.

(b) involuntary commitment proceedings may be instituted against him during his absence by any person who has sufficient knowledge of the situation upon which to base the required affidavit.

(c) if the escapee voluntarily returns to the facility but still desires to be discharged and involuntary commitment proceedings are not instituted, he must be discharged within seventy-two (72) hours from the time of execution of his written request for release.

G.S. 122-56.3 makes it very clear that a written request for release is a prerequisite for the release of a patient who has been voluntarily admitted to a North Carolina treatment facility and that the facility may hold the patient for a period of seventy-two (72) hours after the submission of such request. In the case of a minor, this request for release must be executed by a parent, person standing *in loco parentis* or guardian, as appropriate. See G.S. 122-56.5 and opinion of the Attorney General to Mr. R. J. Bickel, Assistant Director for Administration, Division of Mental Health Services, dated 14 May 1974. Thus, since the requisite statutory formalities have not been complied with in the case of an escapee, the facility may secure the services of a law enforcement officer to obtain his return if such is appropriate.

The governing statutes do not require that the return of an escapee be requested, however, and it would seem that the proper course in a given case would be based upon the situation present there. The action taken should be based upon a recognition that the admission of the patient was originally a voluntary one and that,

absent other action, the patient may secure his release from the facility seventy-two (72) hours after return by making application therefor. Other factors involved in making an intelligent determination of the proper course of action would be whether the original voluntary admission was really in lieu of involuntary commitment, and whether the individual's present mental condition is severe enough to meet the requirements for involuntary commitment and to indicate the propriety of such commitment. In some cases, if involuntary commitment is an order, then initiation of these proceedings–with the resultant taking into custody of the patient in accordance with G.S. 122-58.3–might well be a simpler, more effective course than seeking his return as an escapee.

If involuntary commitment appears appropriate, G.S. 122-58.3 authorizes "...Any person who has knowledge of a mentally ill or inebriate person who is imminently dangerous to himself or others" to execute the requisite affidavit which serves as the cornerstone of this type of proceeding. It would seem that personnel at the treatment facility who have recently observed the patient would be in a singularly good position to execute the affidavit, with no particular functionary being preferred over another as the affiant. Of course, in some instances, a member of the family or other person might be more suitable to perform this act, again depending on the facts present.

Where the escapee is a minor, it would seem that the parent, person standing *in loco parentis* or guardian would normally, as a practical matter, be the determiner as to whether the escapee should be returned in his capacity as a voluntary admittee. Where involuntary commitment appears appropriate, though, while the wishes of the parent, etc., would be worthy of serious consideration, such would not legally preclude the initiation of involuntary commitment proceedings, where appropriate.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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28 August 1974

Subject: Mental Health; Criminal Law and Procedure; Involuntary Commitment of a Defendant Sent to a Mental Health Facility Under G.S. 122-83

Requested by: Mr. Michael Rieder
Regional Administrator
Forensic Services
Division of Mental Health Services
Department of Human Resources

Questions: (1) What findings must be made by a judge in order to warrant placing a defendant in a State mental health facility pursuant to G.S. 122-83?

(2) Does G.S. 122-83 apply in cases where a defendant is charged with either a misdemeanor or a felony and does the duration of the commitment depend upon the maximum sentence permissible for the crime involved?

(3) What, if any, proceedings are necessary after the arrival at a State mental health facility of a defendant who has been sent there under the provisions of G.S. 122-83?

(4) When charges are still pending against a defendant sent to a State mental health facility under the provisions of G.S. 122-83, should the court be notified if his condition changes so that he is mentally capable of standing trial or discharge from the facility is appropriate?

Conclusions: (1) The minimum necessary finding to warrant sending a defendant to a State mental health facility pursuant to

G.S. 122-83 is a finding that the defendant is mentally ill at the time of arraignment and for that reason cannot be tried for the crime alleged.

(2) G.S. 122-83 applies regardless of whether a felony or misdemeanor is involved and the permissible punishment for the crime involved is not controlling of the period of commitment.

(3) The proceedings, time limitations, and provisions for rehearings, set forth in Article 5A, Chapter 122, General Statutes of North Carolina should be followed for the processing of a defendant who has been sent to a State mental health facility pursuant to G.S. 122-83.

(4) When charges are still pending against a defendant placed in a State mental facility pursuant to G.S. 122-83, the appropriate court should be notified by the facility if a change in the defendant's condition indicates that he is mentally capable of being tried or that he should be discharged from the facility.

In pertinent part, G.S. 122-83 provides as follows:

> "All persons who may hereafter commit crime while mentally ill, and all who, being charged with crime, are adjudged to be mentally ill at the time of their arraignment, and for that reason cannot be put on trial for the crimes alleged against them, shall be sent by the court before whom they are or may be arraigned for trial, when it shall be ascertained by due course of law that such person is mentally ill and cannot plead, to any State mental health facility in North Carolina, and they shall be confined therein under the rules and regulations prescribed by the Commission for

Mental Health Services under the authority of this Article, and they shall be treated, cared for, and maintained in said facility..."

Reading of this Section immediately reveals several significant things. First, there is no requirement as to the nature, type or degree of crime charged. Second, there are no specific requirements in the language of the Section for an evaluation by the hospital to determine if the defendant is mentally capable to stand trial or mentally responsible for his crime nor is there a specific directive that the hospital report back to the court on this subject. Third, no time limitations are provided in the language of the Section, so that, under the literal wording thereof, open-end detention would be permitted absent some sort of additional proceedings or action.

This Office has previously had occasion to examine the provisions of G.S. 122-84 and G.S. 122-91 dealing, *inter alia*, with the general subject of disposition of defendants lacking mental capacity or mental responsibility to stand trial. See 43 N.C.A.G. 261 (1973). There, it was concluded that the proceedings authorized by Article 5A, Chapter 122, General Statutes of North Carolina should be utilized for involuntary commitment of individuals falling under the provisions of those sections. The same rationale involved there is proper here.

There is a serious question as to whether G.S. 122-83 was ever intended to serve as the actual vehicle of commitment without implementation as to procedures being derived from other sources. See *State v. Lewis*, 11 N.C. App. 226, pp. 233-234 (1971). Though the Court of Appeals, under the facts of *Lewis*, felt that it was unnecessary to decide that specific question, it clearly ruled that some form of "due process" must be insured to defendants in these situations (op. cited at p. 238), and tacitly recognized that open-end commitment without limitation as to time and conditions would be improper (op. cited at pp. 240-241).

Article 5A has been rewritten by the General Assembly since the date of the opinion set forth at 43 N.C.A.G. 261. Therefore, some of the language of the old statute relied upon in our prior opinion is no longer present in the current statute. However, the new Article 5A contains the following policy declarations indicative of legislative intent:

> "§122-58.1. *Declaration of policy.*–It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others; *that a commitment will be accomplished under conditions that protect the dignity and constitutional rights of the person; and that committed persons will be discharged as soon as a less restrictive mode of treatment is appropriate.*" (Emphasis supplied)

Based upon this language and relying upon judicial decisions in this area–notably *Jackson v. Indiana*, 406 U.S. 715, 718, (1972), and with particular reference to the portions thereof quoted in 43 N.C.A.G. 261 at p. 263–it is clear that open-end, unlimited detention of a criminal defendant based upon his capacity to stand trial would be improper and illegal. Examining the language of G.S. 122-83, it is also clear that a defendant may still "be sent" to a State mental facility under that Section upon a finding by the judge that he is so mentally ill at the time of his arraignment that he cannot be tried. Obviously, under settled North Carolina law, in arriving at that conclusion the judge would have to find that this individual was incapable of understanding the nature of the proceedings and of participating in his own defense. However, upon arrival at the facility, the only procedures available for processing this defendant are found in the provisions of Article 5A, Chapter 122, and the provisions of that Article, including the time limitations, provisions for future examination of the case and rehearings thereon, should be followed.

It would appear that, normally, G.S. 122-83 will be utilized in situations wherein the pending charge against the defendant has not been dismissed or otherwise disposed of. Therefore, though the section contains no specific language requiring a report back to the judge, incorporation of such a directive in the order of the court would be entirely appropriate. Further, even in the absence of such a specific directive, notification of the court of the defendant's condition, of his ability to stand trial, and of any plans to discharge him from the facility should be made to the court issuing the order under the provisions of G.S. 122-83.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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28 August 1974

Subject: Public Contracts; Counties; Lease-Purchase Contract Subject to Public Bidding Requirements of Article 8, Chapter 143

Requested by: Mr. Bruce Yarrington
Assistant to County Administrator
Moore County

Questions: (1) Does a county have authority to purchase fire trucks and other needed equipment under a lease-purchase contract?

(2) Must such contract comply with the provisions of Article 8, Chapter 143 of the General Statutes relating to public bids?

Conclusions: (1) Yes.

(2) Yes.

G.S. 153A-158 authorizes counties to acquire real and personal property by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, and the county may acquire the fee or any lesser interest in such property.

G.S. 153A-165 authorizes counties to lease, as lessee, with or without option to purchase, any real or personal property for any authorized public purpose. *A lease of personal property with an option to purchase is subject to Chapter 143, Article 8 of the General Statutes.*

G.S. 143-129 specifies when public bidding is required. Thus if the cost of the fire truck or equipment is within the cost requirements

of G.S. 143-129, the lease-purchase contract must be let on formal bids. Informal bids could be required pursuant to G.S. 143-131.

Of course, G.S. 152-28(b) is applicable to such contracts and appropriations must appear in the budget for the sum to fall due during the fiscal year.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General

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28 August 1974

Subject: State Departments, Institutions, and Agencies; Chapter 1318 of the 1973 Session Laws, Second Session; Direct Grants to Economic Opportunity Agencies from the Department of Human Resources

Requested by: Mr. David T. Flaherty
Secretary
Department of Human Resources

Questions: (1) Does the Department of Human Resources have the authority under Chapter 1318, 1973 Session Laws to make allocations of the State appropriations provided in Section 9 to eligible community action agencies *in the absence* of notice of termination of funding by the federal Office of Economic Opportunity?

(2) Are allocations to Caswell Action Committee, Inc., and/or Rockingham County Fund, Inc., authorized under Chapter 1318 *in the absence* of notice of termination of funding by the federal Office of Economic Opportunity to the eligible community action programs in North Carolina?

Conclusions:

(1) The Department of Human Resources does not have the authority under Chapter 1318, 1973 Session Laws to make allocations of the State appropriations provided in Section 9 to eligible community action agencies *in the absence* of notice of termination of funding by the federal Office of Economic Opportunity.

(2) Allocations to Caswell Action Committee, Inc., and/or Rockingham County Fund, Inc., are not authorized under Chapter 1318 *in the absence* of notice of termination of funding by the federal Office of Economic Opportunity to the eligible community action programs in North Carolina.

The preamble to Chapter 1318 of the 1973 Session Laws, Second Session, makes explicit that the financial obligation to provide direct grants to economic opportunity agencies is contingent upon a loss of federal financial assistance from the United States Office of Economic Opportunity:

> "Whereas, continued federal assistance from the United States Office of Economic Opportunity (OEO) for these agencies is in grave doubt beyond June 30, 1974; and
>
> "Whereas, the State should provide *standby* funds to assist these local agencies *in the event* federal OEO funds are cut off..."
> (Emphasis supplied)

This conclusion is supported by other sections of Chapter 1318:

> "Sec. 4. *Eligibility for State financial assistance.*–The North Carolina Department of Human Resources is directed to allocate funds provided by this act for basic administrative costs to agencies which on June 30, 1973, were receiving funds from OEO as community

action agencies under 42 U.S.C.A. 2808, or their legal successors ('eligible agencies'). Caswell Action Committee, Inc., and Rockingham County Fund, Inc., are deemed to be eligible agencies for this purpose.

"Sec. 5. *Allocation of State financial assistance.*–Funds to eligible agencies shall be allocated as follows:

(1) An eligible agency wishing to receive funds under this act must apply to the Department for said funds within 60 days *after notice of termination of funding provided to said eligible agency for administrative costs by OEO or its successor.*" (Emphasis supplied)

Sections 5(3) and 9 provide additional support for our conclusion:

"Within 90 days, but after 60 days *from notice of termination by OEO of funding for the administrative costs of eligible agencies...*" (§5(3), Chapter 1318) (Emphasis supplied)

"...If sufficient funds for the basic administrative costs of the economic opportunity agencies in North Carolina are made available to these agencies from the federal government by July 1, 1974, this appropriation shall revert to the General Fund..." (§9, Chapter 1318)

Finally, if there are any doubts remaining as to the clear intent of the General Assembly with respect to the disbursement of funds appropriated by Chapter 1318, they should be quickly resolved by reference to Section 5(6) providing:

"An otherwise eligible economic opportunity agency may qualify for funds under this act *only after notice of termination of funding provided for administrative costs by OEO or its successor.*" (Emphasis supplied)

Although there are other duties and responsibilities reposed in the Department of Human Resources by Chapter 1318 (in particular,

Section 3(3) and (4)) whose performance is not contingent on the loss of federal funds, there is no question but that as a condition precedent to allocating State funds appropriated by this act, there must be at least a *notice of termination* of funding to the eligible community action agency for administrative costs by OEO or its legal successor, if not an actual termination.

Caswell Action Committee, Inc., and Rockingham County Fund, Inc., under Section 4 of Chapter 1318 are simply added to the pool of economic opportunity agencies eligible for State funds should their federal financial assistance for administrative costs be cut off.

James H. Carson, Jr., Attorney General
William Woodward Webb
Assistant Attorney General

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3 September 1974

Subject: Motor Vehicles; Emergency Warning Devices; Civil Air Patrol Emergency Service Vehicles

Requested by: Major Jack D. Cabe
North Carolina State Highway Patrol

Question: Are Civil Air Patrol emergency service vehicles authorized to use emergency warning devices when actually engaged in emergency search and rescue operations?

Conclusion: Yes

The North Carolina Wing of the Civil Air Patrol was created pursuant to Chapter 167 of the General Statutes of North Carolina and transferred to the Department of Military and Veterans Affairs in 1973 by General Statute 143B-248.

The Civil Air Patrol is an auxiliary of the United States Air Force and is charged with the responsibility of conducting air search and

ground rescue and recovery of persons involved in aircraft accidents and as a part of the civil defense preparedness group has responsibility for rescue and recovery in case of natural or man-made disasters and other emergency situations.

Taking into consideration the nature and the duties of the Civil Air Patrol in light of General Statutes 20-125, 20-156 and 20-157, we are of the opinion emergency service vehicles of the Civil Air Patrol when actually engaged in emergency service and rescue operations fall within the purview of the aforesaid sections of the General Statutes of North Carolina.

James H. Carson, Jr., Attorney General
William W. Melvin
Assistant Attorney General

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3 September 1974

Subject: Mental Health; Involuntary Commitment and Voluntary Admissions; Consent to Surgery on Mental Patients; Applicability of Patients' Rights Bill to Local General Hospitals

Requested by: Dr. N. P. Zarzar
Director
Division of Mental Health Services
N. C. Department of Human Resources

Questions: (1) What section of the North Carolina statutes is controlling with regard to the consent required for surgery on patients voluntarily admitted or involuntarily committed as mentally ill persons or inebriates under the provisions of Article 4 or Article 5A of Chapter 122 of the General Statutes?

(2) Does the same section control on the subject of consent for surgery where the patient has been voluntarily admitted or involuntarily committed to a local general hospital under Article 4 or Article 5A of Chapter 122 of the General Statutes?

Conclusions:

(1) G.S. 122-55.6 is the controlling section of the North Carolina statutes with regard to the consent required for surgery on patients voluntarily admitted or involuntarily committed as mentally ill persons or inebriates under the provisions of Article 4 or Article 5A of Chapter 122 of the General Statutes.

(2) G.S. 122-55.6 does control on the subject of consent for surgery where the patient has been voluntarily admitted or involuntarily committed to a local general hospital under Article 4 or Article 5A of Chapter 122 of the General Statutes.

G.S. 122-55.6, which was enacted as a part of the so-called "Patients' Rights Bill" by the 1973 Session of the General Assembly, affords the following guarantees to patients in "treatment facilities":

> "Treatment involving...surgery, other than emergency surgery, shall not be given without the express and informed written consent of the patient if competent, otherwise of the patient and guardian as hereinafter defined, unless the patient has been adjudicated an incompetent under Chapter 35 of the General Statutes and has not been restored to legal capacity, in which case express and informed written consent of his guardian or trustee appointed pursuant to Chapter 35 of the General Statutes must be obtained. Such consent may be withdrawn at any time by the person who gave such consent."

It is interesting to note that G.S. 122-56.5 contains virtually the

same provisions relative to persons who have been voluntarily admitted to treatment facilities and who have been adjudicated *non compos mentis*.

For purpose of the Patients' Rights Bill, G.S. 122-36(g) contains the following illuminating language as to what is to be considered a treatment facility:

> "(g) The words 'treatment facility' shall mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina."

With regard to voluntary admissions of mental patients, G.S. 122-56.2(b) specifies:

> "(b) the words 'treatment facility' as used in this article, mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or inebriety, and any community mental health clinic or center operated in conjunction with the State."

As to involuntary commitment, the statutes do not speak in terms of a "treatment facility". According to the language of G.S. 122-58.8(b), involuntary commitment is authorized:

> "...at a mental health facility, public or private, designated or licensed by the Division of Mental Health Services. Treatment at a private facility shall be at the expense of the respondent to the extent that such charges are not disposed of by contracts between the county and the private facility."

Some question has arisen as to the effect on mental patients of the provisions of G.S. 130-191 which deals with "inmates" of "any

penal or charitable hospital or institution of the State of North Carolina." There are some minor differences between the provisions of that statute and G.S. 122-55.6. However, it is noted that G.S. 130-191 had its genesis in 1919 and that the latest specific change thereto was engrafted by the General Assembly in 1957. It would appear that the later more specific provisions of G.S. 122-55.6, dealing with the limited question of mental patients admitted or committed to treatment facilities, is the controlling statute and will prevail where there are conflicts between it and G.S. 130-191.

In fulfilling the requirements levied under current statutes for the care and treatment of mentally ill patients and inebriates, utilization of local general hospitals as the facilities for inpatient care has become a common place occurrence throughout the State. This use is in keeping with the basic desire to treat the patient locally, where possible, and plans involving such use are formulated under the authorization of G.S. 122-58.16. In such instances, clearly the patients voluntarily admitted or involuntarily committed to the local general hospitals should be given the same rights as those who are placed in facilities operated by governmental entities. As a result, the provisions of G.S. 122-55.6 afford the statutory guidance to local general hospitals concerned with the problem of consent to surgery on patients voluntarily admitted or involuntarily committed to them under the provisions of Article 4 or Article 5A.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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3 September 1974

Subject: Mental Health; Area Mental Health Boards; Authority to Set Salaries of Employees

Requested by: Mr. R. J. Bickel
Deputy Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Questions: (1) In an area mental health program encompassing only a single county, who has the authority to set the wages of employees of the area mental health program?

(2) In an area mental health program encompassing multiple counties, who has the authority to set the wages of employees of the area mental health program?

Conclusions: (1) In an area mental health program encompassing only a single county, the area mental health board has the authority to set the wages of employees of the area mental health program.

(2) In an area mental health program encompassing multiple counties, the area mental health board has the authority to set the wages of employees of the area mental health program.

By virtue of Article 2C, Chapter 122, General Statutes of North Carolina, the Legislature authorized the establishment of area mental health programs to serve the population of their respective geographic entities. These areas may include single or multiple counties. The present questions have apparently arisen because of uncertainty as to whether employees of the area mental health programs are "county employees" falling within the purview of G.S. 126.9.

Each area mental health program is administered by an area mental health board which "...constitutes an entity created by the legislature with governmental functions." See 42 N.C.A.G. 120 (1972). This Office has previously taken the position that an area mental health program is under the authority and control of its mental health board and not the county board or boards of commissioners. See 41 N.C.A.G. 778 (1972).

By virtue of the basic rationale involved in the two prior opinions of this Office to the effect that area mental health programs are

separate entities, it must, of necessity, follow that the employees involved are employees of the area program rather than county employees.

It must be recognized, of course, that the actions of the area mental health boards are subject to the rules and regulations of the State Commission for Mental Health Services and are required to act jointly with the Department of Human Resources in developing annual plans. See G.S. 122-35.20(e). Of great significance in interpreting the intent of the General Assembly are the provisions of G.S. 122-35.20(a) through (d). Therein, it is provided that the boards of county commissioners shall have representation on the area mental health board, and, in some instances, can actually serve as the area mental health board or appoint all members thereof. Thus, it is apparent that it was the legislative intent that the area mental health program be a separate entity but yet be in a position to receive the benefit of some guidance and advice from the boards of county commissioners.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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5 September 1974

Subject: Constitutional Law; Executive Powers; Authority of the Governor of North Carolina to Transfer the Office of Child Development from the North Carolina Department of Administration to the North Carolina Department of Human Resources and the State Office of Economic Opportunity from the North Carolina Department of Human Resources to the North Carolina Department of Administration; Article III, Section 5(10) of the Constitution of North Carolina.

Requested by: Honorable James E. Holshouser, Jr.
Governor of North Carolina

Questions: (1) May the Governor of North Carolina transfer the Office of Child Development from the North Carolina Department of Administration to the North Carolina Department of Human Resources and the State Office of Economic Opportunity from the North Carolina Department of Human Resources to the North Carolina Department of Administration?

(2) Does the Executive Order effecting such transfer have to be submitted to the General Assembly for consideration?

Conclusions: (1) The Governor of North Carolina may transfer the Office of Child Development from the North Carolina Department of Administration to the North Carolina Department of Human Resources and the State Office of Economic Opportunity from the North Carolina Department of Human Resources to the North Carolina Department of Administration.

(2) The Executive Order effecting such transfer does not have to be submitted to the General Assembly for consideration.

Article III, Section 5(10) of the Constitution of North Carolina provides, *inter alia*:

> "...the Governor may make such changes in the allocation of offices and agencies (of the State) and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session..."

The Governor is undoubtedly empowered to effect the transfer of the Office of Child Development from the North Carolina Department of Administration to the North Carolina Department of Human Resources. Moreover, since such transfer in no way affects existing law, no Executive Order need be submitted to the General Assembly.

The transfer of the State Office of Economic Opportunity from the Department of Human Resources to the Department of Administration is only slightly more troublesome, not with respect to the Governor's authority to make a change "in the allocation of offices and agencies" about which there can be no question but rather with respect to the manner in which such a change may be effected.

Chapter 1318 enacted by the North Carolina General Assembly in the second session of the 1973 Legislature reposes certain duties and responsibilities in the North Carolina Department of Human Resources which traditionally would be performed by the State Office of Economic Opportunity located within that Department.* These mandatory functions constitute existing law which if affected by the transfer of the State Office of Economic Opportunity would render the Executive Order subject to submittal to the General Assembly for consideration. Article III, Section 5(10) of the North Carolina Constitution. However, the Executive Order in directing the relocation of the State Office of Economic Opportunity contains the following unequivocal qualification:

> "...said transfer *not to affect* those powers and responsibilities reposed in the North Carolina Department of Human Resources by virtue of Chapter 1318 of the 1973 Session Laws, Second Session, 1974." Executive Order Number VII.
> (Emphasis supplied)

Accordingly, these duties and responsibilities will remain in the Department of Human Resources, thereby avoiding the constitutional command to submit the Executive Order to the General Assembly.

In sum, the Governor is vested with the legal authority to effect

the transfer of the Office of Child Development from the North Carolina Department of Administration to the North Carolina Department of Human Resources and the State Office of Economic Opportunity from the Department of Human Resources to the Department of Administration in the precise manner which he has chosen.

James H. Carson, Jr., Attorney General
William Woodward Webb
Assistant Attorney General

* "Sec. 3. *Designation of administering agency; powers and responsibilities.*–The Department of Human Resources ('Department') is directed to carry out the purposes and provisions of this act. In carrying out this directive, the Department shall:

* * * *

(3) Provide public information on the status of and the causes and effects of economic insufficiency among the people of the State; and

(4) Assist eligible economic opportunity agencies in securing federal, State, and private resources applicable to efforts aimed at promoting economic self-sufficiency and reducing individual and family economic dependence." Section 3(3) and (4), Chapter 1318, 1973 Session Laws, Second Session.

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9 September 1974

Subject:	Elections; Form of Local Ballots; Location of Party Columns.
Requested by:	Ms. Evelyn Lloyd, Member Orange County Board of Elections
Question:	Does a county board of elections have the

authority to arrange the party columns on the local ballots, which the county board is responsible for printing, in a different order than party columns are arranged on ballots which the State Board is required to print?

Conclusion: Yes, unless the State Board of Elections has determined that the party columns for local ballots shall be arranged in a specific manner.

G.S. 163-22(a) confers upon the State Board of Elections general supervision over the primaries and elections in the State, and it has the authority to make reasonable rules and regulations with respect thereto as it deems advisable so long as they do not conflict with provisions of Chapter 163.

G.S. 163-22(e) provides that the State Board of Elections shall determine, in the manner provided by law, the form and contents of ballots to be used in elections. In preparing ballots, the State Board shall seek the aid of the Attorney General who has the duty to advise and aid in the preparation of ballots.

G.S. 163-22(f) imposes the duty upon the State Board to instruct the county boards of elections as to the printing of county and local ballots.

G.S. 163-33 confers certain duties upon county boards of elections, including the power to adopt rules and regulations and instructions not inconsistent with law or the rules established by the State Board, and the duty to advertise and contract for the printing of ballots.

Article 13 of Chapter 163 contains general instructions as to preparation, distribution, financing of ballots, and kinds of ballots including what they shall contain and the arrangement of the ballots.

However, there is no provision in Chapter 163 as to the order in which the various political party columns shall appear on the ballots.

G.S. 163-40(b)(5) relates to the county ballots. This subsection requires the county boards of elections to "assign a separate column

to each political party having candidates for the offices on the ballot and one column to independent candidates, if any." There is no statutory requirement as to arrangement of the columns for the political parties in any particular order on the ballot.

We conclude that if the State Board of Elections has not determined and instructed the county boards of elections as to the order of arrangement of the party columns on the ballots, then the local boards of elections have the authority to determine how the party columns should appear on the county ballots.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General

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16 September 1974

Subject: Mental Health; Voluntary Admissions; Applications for Admission to Treatment Facilities by Persons who are *Non Compos Mentis*

Requested by: Dr. N. P. Zarzar
Director
Division of Mental Health Services
N. C. Department of Human Resources

Questions: (1) May a mentally ill adult who has been judicially determined to be *non compos mentis* be voluntarily admitted to a North Carolina treatment facility solely upon his own request?

(2) May a mentally ill adult who has not been judicially determined to be *non compos mentis* but who is believed by the examining physician to be mentally incompetent at the time of seeking admission be voluntarily admitted to a

North Carolina treatment facility solely upon his own request?

Conclusions:

(1) A mentally ill adult who has been judicially determined to be *non compos mentis* may be voluntarily admitted to a North Carolina treatment facility only upon the application of his guardian or trustee.

(2) A mentally ill adult who has not been judicially determined to be *non compos mentis* may be voluntarily admitted to a North Carolina treatment facility solely upon his own application even though the examining physician may believe that he is not mentally competent at the time.

The following language from G.S. 122-56.5 provides the basis for the first conclusion:

> "In applying for admission to a treatment facility... a guardian or trustee shall act for a person adjudicated *non compos mentis*."

With regard to the second conclusion, G.S. 122-56.3 specifically speaks in terms of "any person" being able, as a statutory right, to seek voluntary admission to a North Carolina treatment facility; the only requirement levied is that such person must submit a written, signed application for evaluation or admission. The only prescribed permissible deviations from the person signing his own application are those contained in G.S. 122-56.5. There, in addition to the language quoted above pertaining to persons judicially declared *non compos mentis*, other provisions are made for the applications of minors.

Nowhere in Article 4 of Chapter 122 is there a statutory provision which would justify refusal of an application for evaluation and treatment submitted by a person who is felt to be *de facto* mentally incompetent solely because the examining physician feels that that condition exists. It is the stated policy of the State of North Carolina

"...to encourage voluntary admissions to treatment facilities." See G.S. 122-56.1. In the light of that policy, it would seem surpassingly ironic to deny prompt, immediate treatment for mental illness merely because the patient displayed one of the symptoms of the mental illness requiring treatment.

Significant as to the intent of the General Assembly are the provisions of G.S. 122-36(n), G.S. 122-55.2 and G.S. 122-55.6. The language used in these three sections (which deal with the rights of mental patients) clearly indicates the legislators' expectations that there would be patients in our treatment facilities who are *de facto* incompetent but have not been nor necessarily shall be required to be judicially declared *non compos mentis*.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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16 September 1974

Subject:	Paroles; Work Release; Term of Imprisonment
Requested by:	Mr. James P. Smith Senior Administrative Assistant Department of Correction
Question:	Are inmates in the custody of the Department of Correction serving life sentences eligible for work release?
Conclusion:	Yes.

N.C.G.S. 148-33.1(b) provides that the Parole Commission may grant work release privileges to an inmate of the Department of Correction "serving a term of imprisonment". In the past it had been our opinion that a life sentence, which by its very term is indeterminate, was not a "term of imprisonment" within the meaning of the statute. Therefore, we had concluded that prisoners serving life sentences were not eligible for work release.

By enactment of Chapter 1201 of the Session Laws of 1973 (2nd Session, 1974), the General Assembly has removed this prohibition. The amendment to N.C.G.S. 14-2 provides that "A sentence of life imprisonment shall be considered as a sentence of imprisonment for a *term* of eighty years in the State's prison." (Emphasis added)

The clear effect of this amendment is that prisoners serving life sentences are now serving "terms of imprisonment" within the meaning of G.S. 148-33.1(b) and are therefore eligible for work release privileges.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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16 September 1974

Subject: Public Contracts; Bid Bonds; Incomplete Bid Bonds; Minimum Number of Bids

Requested by: Mr. William D. Caffrey
Attorney for Greensboro Board of Education

Questions: (1) Does a bid bond which has not been signed by the principal satisfy the bid bond requirements of G.S. 143-129, so that a bid accompanied by such a bid bond may be accepted by the School Board?

(2) Does a bid bond, which does not name the obligee and the space in the bond for the name of the obligee is left blank, satisfy the bid bond requirement of G.S. 143-129?

(3) Are the provisions of G.S. 143-132 met, which require the receipt of at least three competitive bids before an award can be made, when three bids are received

pursuant to advertising as provided by G.S. 143-129 for repair or construction work, but one of the bids received is accompanied by a bid bond which does not comply with the provisions of G.S. 143-129?

Conclusions:

(1) No. A contract of suretyship requires three parties, including the obligee, the obligor, and the principal. The failure of the principal to sign the bond is an irregularity.

(2) No. A bid bond without the obligee named does not comply with the requirements of G.S. 143-129 as an obligee is of the essence of a bid bond and the obligee must be shown upon its face.

(3) Yes. All three bids received may be considered for the purpose of G.S. 143-132, even though one of the bids may contain an informality or irregularity.

The attorney for the Greensboro School Board advises in a letter of July 29, 1974, that the School Board has had some recurring questions arising out of the receipt of incomplete bid bonds and requested an opinion on the following questions for their guidance.

1. Does a bid bond which has not been signed by the contractor as the principal in the bond satisfy the requirements of G.S. 143-129 so that a bid or proposal accompanied by such a bond may be considered or accepted by the School Board? G.S. 143-129 provides that no proposal may be considered or accepted by the Board unless it is accompanied by a deposit of cash, cashier's check, or a certified check. It further provides that "in lieu of making the cash deposit as above provided, such bidder may file a bid bond executed by a corporate surety licensed under the laws of North Carolina to execute such bonds, on condition that the surety will upon demand forthwith make payment to the obligee upon said bond if the bidder fails to execute the contract in accordance with the bid bond." The statute does not contain any further guidance as to the form or

parties of the bid bond. According to some authorities, it is essential to the validity of an official bond or statutory bond and to the liability of the sureties thereon that the bond be signed by the principal; others take the position that failure of the principal to sign an official bond conditioned for the performance of his duties does not render the bond void or release the sureties. 12 Am. Jur. 2d Bonds ¶14. Conflicting authorities on the effect of bonds unsigned by the principal obligor are discussed in an annotation in 12 LRA (NS) 1105. The North Carolina Supreme Court has held that a contract of suretyship requires the three parties of principal, surety, and obligee and the failure of the principal to sign the bond is an irregularity. 6 Strong, North Carolina Index 2d, Principal and Surety ¶1 page 425; *Casualty Company v. Waller*, 233 N.C. 536.

It appears from the foregoing referred annotation that prima facie a "joint and several" bond incomplete on its face is not binding. Although you do not indicate the type of bond you are concerned with, it is assumed that it is "joint and several" as this is the type used in State government. The statutory requirement of a bid deposit or bid bond is material and mandatory. Therefore, this Office is of the opinion that the failure of the principal to execute the bid bond is such an informality which would disqualify the bid from consideration for the award of a contract.

2. Does a bid bond, which does not name the obligee and the space in the bond for the name of the obligee is left blank, satisfy the bid bond requirements of G.S. 143-129? A bid bond must have an obligee shown upon its face as it is of the essence of a bond. *Phelps v. Call*, 29 N.C. 263 (1847). Therefore, a bid bond with a blank space left in the bond for the name of the obligee does not comply with the provisions of G.S. 143-129 for a bid bond.

3. May a contract be awarded when only three bids are received for construction or repair after advertising as required by G.S. 143-129 and one of the three bids is accompanied by a bid bond containing an informality which will not permit the bid to be considered as the basis for an award? Generally, in the absence of a statute providing to the contrary, if only one bid is received after compliance with a statute by the public agency in relation to advertising and notice to prospective bidders, an award duly made to that single bidder is valid. 41 N.C.A.G. 541. G.S. 143-132 provides

that no contract for construction or repairs to which G.S. 143-129 applies shall be awarded unless at least three competitive bids have been received. A competitive bid is a bid received after an opportunity is afforded for everyone to bid and notice of this opportunity is given in accordance with the provisions of G.S. 143-129. The fact that a particular bid is unacceptable or is rejected by the awarding authority because of an informality or for any other reason does not change the status of a particular bid as a "bid received" pursuant to the provisions of G.S. 143-129. This Office is of the opinion that a bid received after advertising as provided by G.S. 143-129 may be counted for the purpose of G.S. 143-132, even though it may contain an informality which causes it to be unacceptable to the awarding authority or to be rejected by the awarding authority. This opinion should not be construed so as to permit the counting of "complementary bids" - those bids submitted by a contractor solely for the purpose of the awarding authority receiving the required number of bids, and not for the purpose of competing for the awarding of a contract - for the purpose of G.S. 143-132. See 40 N.C.A.G. 541 wherein the opinion is expressed by this Office that a communication from a prospective bidder marked "no bid" should not be counted as a bid in determining whether or not the statutory number of bids have been received.

James H. Carson, Jr., Attorney General
Eugene A. Smith
Assistant Attorney General

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17 September 1974

Subject: Constitutional Law; Religion; Highway Map

Requested by: Mr. Troy A. Doby, Secretary
Department of Transportation
and Highway Safety

Question: Does the "Motorist's Prayer" printed on the "Official highway map" published

annually by the Department of Transportation violate the provision of the First Amendment to the United States Constitution which prohibits governmental establishment of religion or the North Carolina Constitution?

Conclusion: Inclusion of the Prayer on an official publication of the State may constitute a violation of religious freedom in the light of federal and State constitutional standards in other factual contexts.

The official North Carolina highway map is published and distributed free to the motoring public by the Department of Transportation which is charged with building and maintaining a statewide system of roads and highways and promoting highway safety. Tax funds from the "State Highway Fund" are used to pay for the cost of publishing and distributing the map. One side carries the map showing all system roads and highways. The other side carries a picture of and message from the Governor, scenic pictures of North Carolina and the questioned "Motorist's Prayer" which has been on the map for more than ten years.

The "Motorist's Prayer" on the 1974-1975 edition of the official North Carolina road map reads as follows:

> "Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car. Grant us safe passage through all the perils of travel; shelter those who accompany us and protect us from harm by Thy mercy; steady our hands and quicken our eye that we may never take another's life; guide us to our destination safely, confident in the knowledge that Thy blessings go with us through darkness and light...sunshine and shower...forever and ever. Amen."

The First Amendment to the United States Constitution concerning religious freedom is brief:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ..."

The North Carolina constitutional provision on religious liberty is Article 1, Section 13:

> "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience."

The North Carolina Constitution contains no express prohibition against governmental sponsorship of religion. However, the North Carolina Supreme Court has stated in many cases that the Constitution of the United States takes precedence over the Constitution of North Carolina, and our courts must accept the interpretation of the United States Supreme Court as to a person's rights under the federal Constitution. *S.S. Kresge Co. v. Tomlinson*, 275 N.C. 1 (1969).

There are no decisions from the federal courts or the North Carolina appellate courts touching directly on this subject; however, from an analysis of recent cases in the area of prayer in public schools, it appears that any governmental purpose to advance or inhibit religion generally, or any sect particularly, will be held to constitute a violation of religious freedom.

In a series of cases (*Everson v. Board of Education*, 303 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McGowan v. Maryland*, 366 U.S. 420 (1961); and *School District v. Schempp*, 374 U.S. 203 (1962)) the United States Supreme Court developed a test for distinguishing between forbidden involvements of the State with religion.

> "The test may be stated as follows:
> What are the purposes and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as

> circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion." 374 U.S. at 222.

Since these decisions, as well as the early "school-prayer" decisions, the Supreme Court of the United States has generally followed a rule of preventing the use of public funds and property in such a manner as to connote governmental sponsorship of religious beliefs. In a recent case, *Committee for Public Education and Religious Liberty v. Nyquist*, 93 S. Ct. 2955 (1973), Mr. Justice Powell, speaking of the prohibition of the establishment of religion in the First Amendment to the United States Constitution, stated,

> "... it is now firmly established that a law may be one respecting the establishment of religion even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than any other but merely benefits all religions alike. It is equally well established, however, that not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon religious institutions is for that reason alone, constitutionally invalid."

It can be forcefully argued that the inclusion of the prayer is for the sole purpose of promoting highway safety. It can also be argued that the inclusion by the Department of Transportation of the "Motorist's Prayer" on the highway map is "indirect", "remote", and not designed to advance religion. In *School District v. Schempp, supra*, Justice Brennan in a concurring opinion, discussed activities which, although religious in origin, had ceased to have religious meaning, such as use of the motto "In God We Trust" on currency, documents, and public buildings, and suggested that the motto and similar activities may have become so deeply interwoven into the fabric of our society as to be constitutionally permissible. Relying on Justice Brennan's language, the New Hampshire Supreme Court in an advisory opinion to the state senate considered constitutionality of a proposed state statute requiring a plaque bearing the words "In God We Trust" to be placed in every public

school classroom. The Court remarked simply that the plaque would not offend the Establishment Clause of the First Amendment. *Opinion of the Justices*, 108 N.H. 97, 228 A.2d. 161 (1967).

The United States Supreme Court has repeatedly stated that in order for governmental activity to withstand constitutional attack the activity must reflect a clear secular purpose, must have a primary effect that does not advance religion, and must avoid excessive governmental entanglement with religion. *Nyquist, supra.* The cases discussed herein have generally applied to school authorities. However, the Court may well apply the same general rules here, and in so doing may find it difficult to discern a secular purpose in the "Motorist's Prayer."

Other lower courts have dealt with similar problems, with varying results. In an Oregon case, *Lowe v. Eugene*, 463 P.2d 360 (Ore., 1969), a Latin cross in a city park was held to violate the state and federal constitutions. A Florida court, however, held that the maintenance of a display of a Latin cross, formed by a string of lights on the side of a courthouse, to be proper in view of a determination that the purpose of the display was to decorate the street and attract holiday shoppers to the downtown area rather than to establish or create a religious symbol, or to promote or establish a religion. *Paul v. Dade County*, 202 So. 2d 833 (Fla., 1967).

Here we are concerned with a prayer. In *De Spain v. DeKalb County Community School District*, 384 F. 2d 836 (7th Cir., 1967), the Court was faced with the following recitation by kindergarten children in a public school:

> "We thank you for the flowers so sweet; we thank you for the food we eat; we thank you for the birds that sing; we thank you for everything."

It was argued that the primary purpose of the verse was secular; however, the Court held that the primary purpose and effect of the verse in question was a religious act of praising and thanking the Deity, and therefore prohibited.

Based on Justice Brennan's language vis-a-vis the motto, "In God We Trust" in the *Schempp* case, if the Department of Transportation

can demonstrate a secular reason for inclusion of the prayer on the map - one that does not advance religion - then there would be no reason for requiring its deletion from future editions of the map. Absent such a showing, and in view of the foregoing, it is felt that the prayer appearing on the official highway map could be held to constitute a violation of the provisions of the First Amendment to the U. S. Constitution. This is a grey area and a definitive ruling could come only from the Supreme Court.

Assuming that the Department included the prayer for a secular reason rather than a religious reason, I would recommend that you continue to use the prayer.

James H. Carson, Jr., Attorney General
R. Bruce White, Jr.
Deputy Attorney General

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17 September 1974

Subject: Counties; Municipal Corporations; Public Utilities; Authority of Counties and Municipalities to Own or Engage in the Business of Operating Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest In, Operate, Subsidize or Finance the Operations of Such Public Utilities Through a Joint Agency or Nonprofit Corporation

Requested by: Mr. Lucius M. Cheshire
Graham and Cheshire
Attorneys for Orange County

Questions: (1) Does a county, including specifically Orange County, have authority, express or implied, to engage in the business of operating either an electric distribution system or a telephone system?

(2) Does a county, including specifically Orange County, have authority to participate in the formation of a nonprofit corporation under Chapter 55A of the General Statutes, including authority to appropriate funds for the creation and/or operation of such a nonprofit corporation, which would engage in operating an electrical distribution system and a telephone system as public utilities?

(3) Does a county, including specifically Orange County, have authority to join with another county or city or municipality for the purpose of operating or owning and operating an electric and/or telephone utility system as a joint venture?

(4) Does a county, including specifically Orange County, have authority to contribute funds to an electric distribution utility or to a telephone utility?

(5) Does a municipality, including specifically the Towns of Chapel Hill and Carrboro, have authority to make financial contributions to an electric power system or telephone system?

Conclusions:

(1) A county, including specifically Orange County, does not have authority under any general law or local act, either expressly or by reasonable implication, to engage in the business of operating an electric power or distribution system or a telephone system.

(2) A county, including specifically Orange County, has no authority under general law or local act, either expressly or by reasonable implication, to participate in the formation of a nonprofit corporation under

Chapter 55A, or to subsidize, appropriate funds for or make contributions for the creation and/or operation of such nonprofit corporation, which corporation would engage in operating an electric power or distribution system or a telephone system.

(3) A county, including specifically Orange County, does not have authority under general law or local act, either expressly or by reasonable implication, to join with another county or city or cities for the purpose of operating an electric and/or telephone utility as a joint venture.

(4) A county, including specifically Orange County, does not have authority under general law or local act to contribute funds to an electric distribution utility system itself or to a telephone utility.

(5) Towns and cities, including the Towns of Chapel Hill and Carrboro, have authority to make financial contributions to an electric power system. Towns and cities, including specifically the Towns of Chapel Hill and Carrboro, do not have authority to make financial contributions to a telephone system.

By general law, counties are bodies politic and corporate and are constituted as a part of State government, as governmental agencies, to exercise only such powers as are specifically prescribed by statute and those which are necessarily or fairly implied therefrom by law as being essential to the exercise of the powers expressly granted. As agencies of State government, their chief purpose is to establish, within their boundaries, the State's political organization, and to effectuate the local civil administration of the powers and authority of State government. They are, in their general nature, governmental, being instrumentalities of government, and possess corporate powers

adapted to its purposes. It has been held that counties are not municipal corporations like cities and towns in a strictly legal sense, in that their purposes are more general and partake more largely of the purposes and powers of government proper. Strong, *N. C. Index 2d*, Vol. V, Pgs. 611-612; *O'Neal v. Wake County*, 196 N. C. 184, 145 S.E. 28; *Manuel v. Board of Commissioners*, 98 N. C. 9, 3 S.E. 829; *Martin v. Board of Commissioners*, 208 N.C. 354, 180 S.E. 777.

While the corporate powers and functions of a county are primarily governmental in nature, the Legislature may confer upon counties, by specific statutory grant, powers which are characterized as "proprietary" in nature. Such functions would include such public purposes as the provision of water and sewer services, airports, public markets, and similar enterprises and have been designated in the basic or general statutory enactments granting such powers to cities and towns and counties as "public enterprises". G.S. 160A-311 and G.S. 153A-274. In the exercise of such proprietary functions or public enterprises, it has been held that the power must be granted in express terms and that the function or enterprise must be essential or not simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation. *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E. 2d 716.

The basic statutory law from which all corporate powers or authority of counties is derived is Chapter 153A of the General Statutes. This Chapter provides, in addition to general corporate powers related primarily to governmental functions in Section 153A-11, authority for the provision for certain health and social services, libraries and "public enterprises". Under Article 15, designated "Public Enterprises", a county may acquire, establish, own and operate public enterprises for its citizens which are specifically defined in G.S. 153A-274 as "(1) water supply and distribution systems, (2) sewage collection and disposal systems, (3) solid waste collection and disposal systems and facilities, (4) airports, and (5) off-street parking facilities." By contrast, Article 16 of Chapter 160A, relating to cities and towns, gives a city similar authority to operate "public enterprises" which, in addition to including by definition all of the enterprises authorized to be engaged in by counties as above enumerated, specifically includes "(1) electric power generation, transmission, and distribution systems;". Since the basic statutory

law relating to the corporate powers or authority of counties (Chapter 153A of the General Statutes and specifically Sections 153A-11 and 153A-274) pointedly excludes the power to engage in or furnish to the public electric and telephone utility services (in contrast to the specific authority granted to a city with reference to electric service), there does not appear to be any general law or statute that grants to counties in general or Orange County in particular, either expressly or by any reasonable implication (including the provisions of Chapter 159 of the General Statutes relating exclusively to local government finance authority), any authority to operate an electric power system or a telephone system, or to acquire a beneficial interest in an electric power system or a telephone system owned or operated by another entity. There, likewise, does not appear to be any local act which would grant, either expressly or by reasonable implication, such authority to Orange County.

There does not appear to be any general statutory authority, or local act, which authorizes, either expressly or by reasonable implication, any county, including Orange County, to participate in the formation of a nonprofit corporation under Chapter 55A of the General Statutes or to appropriate any funds for the creation and/or operation of such a nonprofit corporation which is designed to engage in operating either an electric distribution system or a telephone system as a public utility. It is fundamental, and our Courts have so held, that a person or legal entity will not be permitted to do indirectly that which he or it is forbidden or lacks authority to do directly. Under the above-cited authorities, this is particularly true of a municipal coporation or county, and any such unit of local government cannot acquire a power it lacks by entering into a joint venture with another unit of local government that may possess such power.

With respect to the power to enter into a joint venture, or to act through joint agencies including a nonprofit corporation, unless specifically authorized by statute or special act of the Legislature, a county must exercise its corporate power, including every right, duty and function, directly through the action of its Board of Commissioners. G.S. 153A-12; *O'Neal v. Wake County, supra.* In 1971, the Legislature enacted as a part of Chapter 896 of the Session Laws of 1971, which repealed most of Chapter 160 and enacted

a new Chapter 160A, what is referred to as the Joint Exercise of Powers Act, which is codified as Article 20 relating to "Inter-local Cooperation" in Chapter 160A. Under this Act (G.S. 160A-461), any unit of local government may enter into contracts or agreements with each other in order to execute any "undertaking". G.S. 160A-461 specifies that the contracts and agreements shall be of reasonable duration, as determined by the participating units, and shall be ratified by resolution of the governing board of each unit spread upon its minutes. G.S. 160A-462 specifies that such units agreeing to an "undertaking" may establish a joint agency charged with any or all of the responsibility for the undertaking. This statute specifies that such units may confer on the joint agency any power, duty, right or function needed for the execution of the undertaking, except that legal title to all real property necessary to the undertaking shall be held by the participating units individually, or jointly as tenants in common. G.S. 160A-464 specifies what any contract or agreement establishing an undertaking must contain in the way of terms and conditions. Under this Act, specifically G.S. 160A-460, a unit of local government is defined to include a county or city. However, an "undertaking" which any such unit is authorized by G.S. 160A-461 to execute through the method of formal contract or agreement is defined to mean "the joint exercise by two or more units of local government, or the contractual exercise by one unit for one or more other units, of any *administrative or governmental* power, function, right, privilege, or immunity of local government." (Emphasis added.) Based on the wording of this statute defining the word "undertaking", including specifically the insertion of the limiting or restricting words "administrative or governmental" above emphasized and the legislative history of this Act, including the amendment which revised the definition of the word "undertaking" to include this restrictive language, it appears that it was the leglislative intent to authorize inter-local cooperation between units of local government through joint agency exercise of corporate powers only in the area of traditional governmental functions and that proprietary functions or "public enterprise" functions, as above designated, were intended to be excluded.

With respect to the authority of a county to subsidize or make contributions to either an electric distribution utility or a telephone utility, it has been held that the expenditure of tax revenue or public

funds, either by a county or a city, cannot be made without the explicit or reasonably implied statutory authority. The power of a city or county to appropriate tax revenue is measured by the same criteria as those governing its taxing power, one of which is that the expenditure must be for a public purpose. An appropriation is for a public purpose if it is for the support of the government or for any of the recognized objects of government. Strong, *N.C. Index 2d*, Municipal Corporations, Vol. 5, Pgs. 707-711.

As to whether a municipality, including specifically the Towns of Chapel Hill and Carrboro, has authority to make financial contributions to an electric power system or telephone system, there does not appear to be any statutory authority for any city in North Carolina to operate a telephone system, with the exception of the Town of Pineville in Mecklenburg County, which has such authority pursuant to amendment to its corporate charter. Therefore, it does not appear that either the Town of Chapel Hill or the Town of Carrboro has any authority to operate or acquire any beneficial interest in a telephone system, and, lacking such authority, neither town has authority to appropriate public funds for that purpose, either directly or indirectly.

As to an electric power system, both the Town of Chapel Hill and the Town of Carrboro have authority under G.S. 160A-311 and 160A-312 to "acquire, construct, establish, enlarge, improve, maintain, own and operate" an "electric power generation, transmission, and distribution system". Having this basic authority, either of these two municipalities may appropriate public funds to acquire and finance the cost of such a public enterprise, subject to the restrictions, limitations and regulations otherwise provided by law (including specifically the provisions of Chapter 159 of the General Statutes relating to local government finance) in order to operate an electric power system of its own (G.S. 160A-313). In so doing, the two towns could enter into a mutual aid agreement pursuant to the provisions of G.S. 160A-318. Beyond this authority, there does not appear to be any statutory authority, either by general or special act, authorizing the Towns of Chapel Hill and Carrboro to enter into a joint venture through a joint agency or to make financial contributions to such agency for the purpose of operating jointly an electric power system or telephone system, unless the provisions of the Joint Exercise of Powers Act (Chapter

160A, Article 20, Sections 160A-460 through 160A-464) can be construed as being broad enough to indicate the legislative intent to allow cities and towns to engage in proprietary functions as opposed to strictly governmental functions through joint agencies under this Act. For the reasons above stated, this does not appear to have been the legislative intent and such Act is, therefore, not so construed.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General
I. Beverly Lake, Jr.
Deputy Attorney General

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23 September 1974

Subject: Mental Health; Business and Commerce; Applicability of Professional Corporation Act to Foreign Corporation Providing Psychiatrists for Area Mental Health Program

Requested by: Mr. Jack Styles
Corporations Attorney
Department of the Secretary of State

Questions: It is presently proposed that a North Carolina multi-county area mental health program enter into an agreement with a Virginia professional corporation whereby the corporation will provide one named psychiatrist, who is licensed as a medical doctor in North Carolina, as clinical director of the mental health center operated by the area mental health program. In this situation:

(1) must the Virginia professional corporation obtain a certificate of

authority to do business in North Carolina pursuant to G.S. 55B-10?

(2) must the other psychiatrists who are shareholders in the professional corporation but who will not personally furnish any services under this agreement be licensed to practice medicine in North Carolina?

Conclusions: In the situation described:

(1) the Virginia corporation is not required to obtain a certificate of authority to do business in North Carolina pursuant to G.S. 55B-10.

(2) the other psychiatrists who are shareholders in the professional corporation but who will not personally furnish any services under the agreement are not required to be licensed to practice medicine in North Carolina.

This Office has previously addressed the subject of foreign professional corporations practicing in North Carolina and the need for compliance with Chapter 55B of the General Statutes. See 41 N.C.A.G. 60 (1970), 40 N.C.A.G. 46 (1970), 40 N.C.A.G. 58 (1970), and 41 N.C.A.G. 934 (1972). From literal reading of Chapter 55B, it appears that the primary object of that Chapter is to govern the general, private practice of a particular profession in this State by a professional corporation. That, of course, was what was involved in the prior situations considered by this Office resulting in the above cited opinions. Conversely, here what is involved, in reality, is merely the employment of a single psychiatrist by a governmental entity to fulfill the responsibilities and needs levied upon that governmental entity by statutes and mental health regulations.

Indicative of the intent of the General Assembly that the provisions of Chapter 55B should be limited in scope, it is noted that the only prohibitory language in Chapter 55B is found in G.S. 55B-10 as follows:

"No professional corporation shall *open, operate, or maintain an establishment* for any of the purposes set forth in this Chapter without first having obtained a certificate of registration from the licensing board or boards." (Emphasis supplied)

Clearly, under the agreement currently proposed, the professional corporation involved is not planning to "open, operate or maintain an establishment" within this State.

This is obviously not a situation wherein there is any danger of granting an advantage to a foreign professional corporation operating here in the general practice in competition with domestic professional corporations or practitioners. See 41 N.C.A.G. 60, at page 667. As has been previously noted by this Office, Chapter 55B contains no specific requirement that foreign professional corporations domesticate under that Chapter, with the resultant automatic requirement for licensing of all professional members by an appropriate licensing board in North Carolina. Further, we are not here confronted with a situation involving North Carolina residents who have formed an out of state corporation for the purpose of practicing in this State, with the resultant violation of the *spirit* of Chapter 55B. Compare 41 N.C.A.G. 60, at pages 65-66; also compare 40 N.C.A.G. 46.

Under the proposed plan, there is no legal requirement nor justifiable need for causing the remaining shareholders who will not be practicing in this State to obtain licenses from the appropriate agency in this State.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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23 September 1974

Subject: Social Services; Juvenile Hearings in Cases Involving Child Neglect and/or Abuse and Termination of Parental Rights; Evidence:

Admissibility of Records Made by Social Workers No Longer Employed by the County Department of Social Services

Requested by: Mr. Thomas W. Hogan
Director
Durham County Department
of Social Services

Question: May a social worker who is currently assigned to work with a family receiving assistance from the county department of social services refer in a juvenile court hearing to records made by social workers no longer employed by the department and unavailable for examination in the judicial proceeding?

Conclusion: A social worker who is currently assigned to work with a family receiving assistance from the county department of social services may, as a general rule, refer in a juvenile court hearing to records made by social workers no longer employed by the department and unavailable for examination in the judicial proceeding.

Juvenile court proceedings have traditionally never been rigid models of procedure. In fact, it was not until recent years that most of the constitutional safeguards afforded adults in criminal cases were extended to juvenile proceedings. See *In Re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428(1967). The State has historically employed its power as "*parens patriae* to protect and provide for the comfort and well-being of such of its citizens as by reasons of infancy...are unable to take care of themselves." *McLean v. Humphreys*, 104 Ill. 378 (1882). For instance, at present the purpose of the judicial procedure applicable to juveniles, set forth in G.S. 7A-277, is "...to provide a *simple judicial process* to provide such protection, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction in the best interest of the State..." The juvenile hearing

to determine whether a child is delinquent, dependent, neglected or undisciplined "shall be a *simple judicial process...*" G.S. 7A-285. Thus, as a general rule doubts concerning the admissibility of evidence in juvenile proceedings directly involving the welfare of a child, such as in child abuse or neglect cases, should be resolved in favor of admissibility.

However, in any event, it appears that the records made by a social worker no longer employed by the county department of social services and unavailable for examination in the judicial proceeding may be referred to in a juvenile court hearing under two exceptions to the hearsay rule: that pertaining to duly authenticated, official written statements made by a public officer within the scope of his authority or duty (and within the scope of his personal knowledge - 42 ALR 2d 752) and that pertaining to duly authenticated record entries made in the regular course of business. *Stansbury's N. C. Evidence*, Brandis Revision, §§ 153 and 155. As to the former, note Strong, N. C. Index 2d, Evidence, §28, p. 639: " The contents of a public record may be proved in any court by the original record itself." See also *State v. Lewis*, 7 N. C. App. 178, 184, 171 S.E. 2d 793 (1970). With respect to the latter exception, social services records comprising a series of entries from several social workers are analogous to entries in hospital records which when properly authenticated are ordinarily admissible. As to copies of records, see G.S. 8-44.1 (Chapter 1332 of the 1973 Session Laws, Second Session) and G.S. 8-34.

The bases for these exceptions to the hearsay rule, certainly present in the situation under discussion in this opinion, are necessity and circumstantial probability of trustworthiness. See *Wigmore on Evidence*. 3d ed., §§1421 and 1422. The "necessity" basis simply implies that unless the evidence is admitted, certain salient facts may otherwise be lost. Total inaccessibility of first-hand knowledge is not required. *Wigmore on Evidence*, §1421. Concerning the "circumstantial probability of trustworthiness" basis, it must be patent that there is no motive for fabricating or distorting the record entries.

Accordingly, while the admissibility of these records must obviously be determined on an *ad hoc* basis, such rulings should be rendered in the context of the above considerations.

James H. Carson, Jr., Attorney General
William Woodward Webb
Assistant Attorney General

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23 September 1974

Subject:	Courts; Clerk of Superior Court; Compliance with Judgment; Lack of Jurisdiction of Court to Enter Judgment; Interpretation of G.S. 7A-111
Requested by:	Mrs. Dorothy P. Pate Clerk of Superior Court Craven County
Question:	May a clerk of superior court pay the medical and dental expenses of a minor pursuant to a judgment, in disregard of G.S. 7A-111, without incurring liability therefor?
Conclusion:	Under the facts of the case, as set out hereunder, the Clerk should decline payment pursuant to the judgment but the Clerk may make payment, without risk of liability, in accordance with G.S. 7A-111.

In the case under discussion, the mother of the minor, as *guardian ad litem*, instituted the action. The court found that the negligence of the defendant was the proximate cause of the injuries suffered by the minor and that the mother was contributorily negligent. The court ordered, adjudged and decreed that the minor have and recover a certain sum from the defendant; that said sum be deposited in the Registry of the Clerk of Superior Court of Craven County for the use and benefit of the minor; that the Clerk of Court pay all unpaid medical bills arising from the accident from said sum; and that the balance of the funds be paid for any dental services incurred on behalf of the minor.

The Clerk of Court questions the propriety of the provisions of the judgment requiring the payment of future dental expenses which are not directly connected with the accident without regard to G.S. 7A-111(c) which authorizes the clerk to disburse moneys, paid into the clerk pursuant to the section, for the best interest of the child if the clerk first determines that the parents or other persons *in loco parentis* are financially unable to provide the necessities of life required by the child.

In *Teele v. Kerr*, 261 N.C. 148, 134 S. E. 2d 126 (1964), the Supreme Court stated:

> "Under our statutes only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant. G.S. 1-39. See *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176. In practice, the defendant pays the judgment to the Clerk of Superior Court who holds the funds until the minor becomes twenty-one or until a general guardian is appointed for him unless the sum is $1,000.00 or less when he may disburse it himself under the terms of G.S. 2-53." (at 151)

G.S. 7A-111 has superseded G.S. 2-53 and presently contains the provisions of law cited as G.S. 1-39.

It is clear that G.S. 7A-111 is applicable to the disbursement of all money in the amount of $2,000.00 or less received by the clerk of court for the benefit of a minor and that the provisions of the judgment in the case under discussion are in conflict with the statute. The judgment directs that all unpaid medical bills arising from the accident and any expenses of dental services incurred on behalf of the minor be paid from the amount received by the Clerk in satisfaction of the judgment without any consideration of the financial ability of the parent to pay for such medical and dental services.

The question becomes whether the Clerk of Court, in order to fulfill the duties of his office and in order to avoid liability to the minor for wrongful disbursement of funds, should comply with the judgment of the court or the provisions of the statute. ".../A/n order

of the judge as to a matter within his jurisdiction, even though erroneous in law, is nevertheless binding on the clerk, and he is bound to obey or render himself liable to attachment for contempt." *State v. Sawyer* 223 N. C. 102, 105, 25 S. E. 2d 443 (1943). The purpose of the rule is two-fold: first, to insure the efficient administration of the judicial process; and, second, to protect the clerk from liability in the performance of his duties. Question now arises as to whether the court had jurisdiction to enter the judgment under discussion herein.

The facts in *White v. Osborne*, 251 N. C. 56, 110 S. E. 2d 449 (1959), are similar to the facts of the present case. Therein, the father, as next friend, instituted the action. The father presented his claim for medical expenses in the action and, absent objection, the claims of both the father and the son were litigated. The judgment was a composite of the claims of father and son; and the judgment provided that, in the event the judgment was not collected in full, priority would be given to the father's claim. The Supreme Court concluded that the conflicting interests of father and son rendered the father's representation of the son ineffective and raised a question whether the court had jurisdiction over the son. The court concluded that unless and until the son was represented by a disinterested *guardian ad litem* in the proceeding instituted under G.S. 109-36 by the father to compel payment by the clerk, the clerk would not be protected from liability to the son.

Therefore, it is the opinion of this Office that if the mother demands payment of the dental as well as the medical expenses of her son pursuant to the judgment of the court, the Clerk should decline payment because of the conflicting interests of mother and son in respect of the sum received in satisfaction of the judgment and therefore possible lack of jurisdiction of the court over the minor in respect of this issue. The mother may then institute a proceeding under G.S. 109-36 against the Clerk. The son should be represented at the proceeding by a disinterested *guardian ad litem* who may file such an answer as may be appropriate to safeguard and protect the rights of the infant. Alternatively, the mother, in requesting payment for her son's medical or dental expenses, may present such evidence to the Clerk which will permit the Clerk to disburse the funds in accordance with the provisions of G.S. 7A-111. If the Clerk

complies with G.S. 7A-111 and thereby fully protects the rights of the infant, the Clerk may disburse the funds without risk of liability to the infant.

James H. Carson, Jr., Attorney General
Robert R. Reilly
Associate Attorney

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23 September 1974

Subject:	Corporations; Professional Corporation Act; G.S. 53-127; G.S. 55B-3
Requested by:	Ms. Rachel B. Ingle Assistant Clerk of Superior Court Mecklenburg County
Question:	May a professional corporation, organized under Chapter 55B of the General Statutes, qualify before the clerk of superior court as executor and trustee of a will?
Conclusion:	No.

A professional corporation of attorneys, organized under the provisions of Chapter 55B of the General Statutes, desires to qualify before a clerk of superior court as the executor and trustee pursuant to the provisions of a will. G.S. 53-127 provides in pertinent part: "No person, association, firm or corporation domiciled within the State of North Carolina, except corporations, persons, associations, or firms reporting to and under the supervision of the Commissioner of Banks or under the supervision of the Commission of Insurance, shall...transact business as a trust company..."

G.S. 55B-3 provides: "The Business Corporation Act shall be applicable to such professional corporations, including their organization, and professional corporations shall enjoy the powers and privileges and shall be subject to the duties, restrictions and liabilities of other corporations, except insofar as the same may be

limited or enlarged by this chapter. If any provision of this chapter conflicts with the provisions of the Business Corporation Act, the provisions of this chapter shall prevail."

There appear to be no provisions in the Business Corporation Act which would negate the prohibition contained in the portion of G.S. 53-127 quoted above. Therefore, a professional corporation may not qualify as a trustee under a will.

James H. Carson, Jr., Attorney General
Millard R. Rich, Jr.
Assistant Attorney General

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23 September 1974

Subject: Motor Vehicles; Driver's License; G.S. 20-16, Points, and G.S. 20-13, Provisional Licensee; Moving Violation

Requested by: Mr. Edward H. Wade, Director
Drivers License Division
N. C. Department of Motor Vehicles

Question: In light of the 1973 amendment to G.S. 20-13(a), should the Department of Motor Vehicles now assign driver's license points to licensees upon conviction of a violation of the equipment requirements of Part 9 of Article 3 of Chapter 20 of the North Carolina General Statutes as set forth in Attorney General Opinion to Mr. Henry W. Whitesides, Solicitor, Fourteenth Solicitorial District, dated 24 January 1971?

Conclusion: No.

G.S. 20-13(a), as amended, provides:

"(a) The operator's license of any person shall be suspended by the Department without preliminary hearing upon notice to the Department of such person's conviction of a motor vehicle moving violation, as specified in subsection (b), committed while such person was still a provisional licensee. A provisional licensee is any licensee who has not attained his eighteenth birthday. A motor vehicle moving violation, as used herein, does not include any of those offenses for which no points under the point system may be assessed by specific reference in G.S. 20-16(c), *nor does the term include those equipment violations specified in Part 9 of Article 3 of this Chapter.*" (Emphasis added)

In view of the fact that all convictions for which point values are established by the General Assembly under G.S. 20-16(c) are for violations of rules of the road except for three points assigned for failure to maintain liability insurance; that many equipment violations are expressly excluded from assessment of points under this section; and that all convictions for equipment violations are excluded from G.S. 20-16(a), we are of the opinion that although equipment violations will normally occur when a motor vehicle is in operation on a street or highway, convictions for such violations were not contemplated as falling within the provisions of G.S. 20-16(c) ("All other moving violations...2") and that no points should be assessed therefor.

This opinion supersedes the opinion of this Office of 27 January 1971 to Mr. Henry M. Whitesides, 41 N.C.A.G. 211.

James H. Carson, Jr., Attorney General
William W. Melvin
Assistant Attorney General

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23 September 1974

Subject: Mental Health; Personnel; Exemption of Physicians from Mandatory Retirement at Age 65

Requested by: Dr. N. P. Zarzar, Director
Division of Mental Health Services
N. C. Department of Human Resources

Question: Does an action of the North Carolina State Personnel Board exempting State-employed physicians from mandatory retirement or termination of employment at age 65 automatically result in a violation of the constitutional rights of State employees in other professional disciplines?

Conclusion: The action of the North Carolina State Personnel Board as described does not violate the constitutional rights of State employees in other professional disciplines so long as it is based upon a valid State need resulting from a critical shortage of qualified physicians which requires this action.

In general, State employees who are subject to the Personnel Act are required to retire or be terminated from employment at the end of the month in which they reach age 65. The State Personnel Board has established a policy providing for exceptions to be made to this general rule, and such policy provides, in part, as follows:

> "At times an adequate supply of personnel may not be available to provide the highly professional services required of the State. In such cases, the State Personnel Board shall establish the specific job classifications identified with a critical shortage of qualified manpower. In identifying such classifications, the State Personnel Board shall include in its analysis and evaluation the needs of State government, the availability of qualified persons and any geographical influences which may have a bearing on employment within a given area.
>
> "An employee occupying a job classification that has been established as critical, Statewide or in a given

geographical area, by State Personnel Board, may at the request of his department or agency head, continue his employment beyond age 65 on a year-for-year basis."

An employee of the State of North Carolina does not have a property right to his job. See *Mial v. Ellington*, 134 N.C. 131 (1903). Thus, the main question involved here is whether the State Personnel Board policy violates the Equal Protection Clause of the Constitution of the United States or the North Carolina Constitution. See Constitution of the United States, Amendment XIV; North Carolina Constitution, Article 1, §19. The basic test for determining whether or not the difference in treatment to different classifications of personnel is violative of these constitutional provisions is whether the exception made has a reasonable basis in relation to the purpose and subject matter involved. The traditional equal protection test does not require that the very best classifications be made in the light of a legislative or a regulatory purpose; it requires only that such classification in relation to such purpose attain a minimum level of rationality. See *Guthrie v. Taylor*, 279 N. C. 703 (1971). To be justifiable, the classification must be reasonable, not arbitrary, and must be based upon some fair and substantial determination of differences between the classes as affecting the needs of the State so that all persons similarly circumstanced shall be treated alike under the policy. See *N. C. Association of Licensed Detectives v. Morgan*, 17 N.C. App. 701 (1973). In order to fall afoul of the constitutional requirements for equal protection, any discrimination involved must achieve the level of "invidious discrimination".

Scrutiny of the policy involved here clearly indicates that, if it is factually well founded, it is a legitimate policy designed to fulfill the authorized State function of protecting the public health and welfare.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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23 September 1974

Subject:	Mental Health; Area Mental Health Programs; Testing of Individual Models for Delivery of Mental Health Services
Requested by:	Dr. N. P. Zarzar, Director Division of Mental Health Services N. C. Department of Human Resources
Question:	Can the funds appropriated by Chapter 1442, 1973 Session Laws (Second Session 1974) be used to test various modules of mental health services in separate programs located in four different area mental health programs?
Conclusion:	The funds appropriated by Chapter 1442, 1973 Session Laws (Second Session 1974) can be used to test various modules of mental health services in separate programs located in four different area mental health programs.

Chapter 1442 appropriates $581,622 "...to the Division of Mental Health Services, Department of Human Resources, for a management information system and planning for a model mental health system." Sections 3 and 4 of Chapter 1442 revised the Mental Health Care Study Commission--which had been established and subsequently automatically terminated by the terms of 1973 General Assembly Resolution 80--with all of its original powers and duties.

As originally created, the Study Commission was designed to study, evaluate and recommend improved systems for the delivery of state health care, mental illness, mental retardation, alcoholism and related health problems. Sections 6 and 7 of the creating Resolution gave the Study Commission the broadest possible powers, in fact virtually *carte blanche*, in achieving its primary goal.

It appears that what is now proposed is the testing of single modules of service (such as services dealing with mental retardation,

alcoholism, adult mental health and child mental health) in four separate area mental health programs. Clearly the establishment of these four separate programs falls within the purpose of the appropriation made by Chapter 1442 and there are no prohibitions within that Chapter prohibiting the use of the funds in this fashion. Equally clearly, the authority to establish these four individual programs is included within the powers vested in the Mental Health Care Study Commission by virtue of the provisions of Resolution 80 and Chapter 1442.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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23 September 1974

Subject: State Departments, Institutions and Agencies; Alcoholism Research Authority; Appropriations; Expenditures; Agreements; Overhead Expenses of Research Facilities; Payment by Authority

Requested by: Dr. John A. Ewing
Executive Director
North Carolina Alcoholism Research Authority

Questions: (1) May the North Carolina Alcoholism Research Authority enter into an agreement with a unit of the University of North Carolina which agreement provides for payment by the Authority to such unit of a portion of the salaries and wages of employees of the unit as an indirect cost attributable to research desired by the Authority relative to alcoholism?

(2) May such payments be made from funds appropriated by the State of North Carolina?

Conclusions:

(1) The North Carolina Alcoholism Research Authority may enter into an agreement with a unit of the University of North Carolina which agreement provides for payment by the Authority to such unit of a portion of the salaries and wages of employees of the unit as an indirect cost attributable to research desired by the Authority relative to alcoholism.

(2) Such payments may be made from funds appropriated by the State of North Carolina.

Questions (1) and (2) will be considered together. The North Carolina Alcoholism Research Authority was created by G.S. 122-120 and is authorized to receive State funds under the provisions of G.S. 122-121. The latter is in pertinent part as follows:

> "The Authority shall expend these funds on research as to the causes and effects of alcohol abuse and alcoholism, and for the training of alcohol research personnel. Expenditures for the purposes specified in this section shall be made as appropriations to nonprofit corporations, organizations, agencies, or institutions engaging in such research or training."

G.S. 122-122 authorized the Authority to adopt and promulgate rules and regulations relative to application for, receiving of, and awarding grants.

Chapter 1466 of the Session Laws of 1973 (2nd Session, 1974) appropriated to the Department of Administration $250,000.00 for the purpose of commencing the total program necessary to eliminate alcoholism as a public health problem. This legislation specifically mentions the 16 units of the University of North Carolina, the Schools of Medicine in North Carolina, as well as other nationally recognized private educational institutions in the State, as providing potential qualified scientists capable of solving these problems through research.

The statutes creating the Authority clearly show the legislative intent that it act promptly to begin the necessary research to solve the problems of alcoholism. This the Authority may do by agreement with any institution specified in Chapter 1466 of the 1973 Session Laws (2nd Session, 1974). This Office is of the opinion that where salaries and wages of employees of the organization doing such research constitute a portion of the total cost, and the agreement so provides, the Authority may pay the same. Such payment may be made from State funds appropriated for research and available to the Authority.

James H. Carson, Jr., Attorney General
Parks H. Icenhour
Assistant Attorney General

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23 September 1974

Subject: Parole; Escape; Detainers

Requested by: Mr. M. H. Hand
Deputy Administrator
Out-of-State Parolee Supervision
Parole Commission

Questions: (1) May the Parole Commission grant parole to an escaped prisoner?

(2) May the Parole Commission grant parole to an inmate who has a detainer lodged against him?

Conclusions: (1) No.

(2) Yes.

In certain situations it may be desirable to grant parole to an escapee. However, regardless of this desirability, the authority of the Parole Commission is limited by statute. N.C.G.S. 148-52(a) empowers the Parole Commission to parole "persons held by virtue of any final

order or judgment of any court of this State in any prison, jail, or other penal institution of this State or its political subdivisions." This is the statutory authority of the Parole Commission to grant paroles. An escapee is clearly not "held" in any "prison, jail, or other penal institution of this State or its political subdivisions" and is therefore ineligible for parole until such time as he is again in custody in this State. Cf. N.C.G.S. 148-41.

When a detainer has been lodged against an inmate who is otherwise eligible for parole consideration and the Parole Commission deems it desirable, he may be paroled to the custody of the jurisdiction filing the detainer.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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23 September 1974

Subject: Prisons and Prisoners; Criminal Law and Procedure; Escape, Warrants; Arrest.

Requested by: Honorable Herbert Small
District Attorney
First Judicial District

Questions: (1) May correctional officers arrest persons on escape for the crime of escape?

(2) May correctional officers serve warrants on persons in the custody of the Division of Prisons?

Conclusions: (1) Yes.

(2) No.

N.C.G.S. 148-4 provides that "...The authorized agents of the Commissioner (of Correction) shall have all the authority of peace

officers for the purpose of...apprehending, arresting, and returning to prison escaped prisoners..." Further, N.G.G.S. 148-40 allows any citizen to "apprehend", "retain", and "deliver" escapees to the Department of Correction. Therefore, it is clear that correctional officers may arrest persons on escape for the crime of escape.

However, the authority of correctional officers to serve warrants upon the recaptured prisoner is another matter. N.C.G.S. 15-20 provides that warrants may be served by the sheriff or "lawful officers" of the county. While correctional officers are clothed with some of the authority of peace officers, they do not possess all the powers of peace officers. Cf. *Gowens v. Alamance Co.*, 216 N.C. 107 (1939); *State v. Burnett*, 183 N.C. 703 (1922); *State v. Stancill*, 128 N.C. 606 (1901).

Correctional officers may perform only those functions of law enforcement officers specifically granted them by statute. *Gowens v. Alamance Co., supra.* Under N.C.G.S. 148-4, those functions are "...transferring such prisoners from place to place in the State..." and "...apprehending, arresting, and returning to prison escaped prisoners..." Because prison guards are not specially empowered to serve warrants, they may not do so whether for escape or any other crime. Warrants must be served by the sheriff, deputy sheriff, or some other law enforcement officer.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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25 September 1974

Subject: Elections; Absentee Ballots; Validity of Absentee Ballots When the Voter Expects to be Absent from the County but is Not Absent on Election Day.

Requested by: Mr. Carmel Crisp
Chairman
Graham County Board of Elections

Question: Is an absentee ballot valid when the voter has made application and obtained a ballot on the representation that he expects to be absent from the county on election day but in fact is not absent from the county on election day?

Conclusion: Yes.

G.S. 163-226 and G.S. 163-227.2 authorize any qualified voter to vote by absentee ballot if he expects to be absent from the county in which he is registered during the entire period that the polls are open on the day of the statewide primary or general election in which he desires to vote. We find no provision in the statute which makes the ballot invalid in the event the voter finds that his plans have changed and in fact he will not have to leave the county for the entire period during the day of the election.

G.S. 163-233.1 provides that no person shall be permitted to withdraw an absentee ballot after such ballot has been mailed to or returned to the county board of elections.

Thus the mere fact that a voter finds that his good-faith plans to be absent from the county on the day of the election have changed so that he is not absent from the county does not render the absentee ballot invalid, or subject to challenge for this reason.

However, since the absentee voter executes an affidavit on the ballot and swears that he will be absent from the county in which he resides, as required pursuant to G.S. 163-229, it is possible that such voter would be in violation of G.S. 163-275(4), which makes it a felony for any person knowingly to swear falsely with respect to any matter pertaining to any primary or election. Thus if a voter obtains an absentee application and votes an absentee ballot knowing that in fact he will not be absent from the county on the day of the primary or election, it appears that he could be charged with a violation of G.S. 163-275.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General

25 September 1974

Subject:	Mental Health; Involuntary Commitment; Conditional Discharge or Release of Forensic Patients
Requested by:	Dr. Bob Rollins Director, Forensic Services Division of Mental Health Services N. C. Department of Human Resources
Question:	At the time of the involuntary commitment or recommitment hearing on a forensic patient who has been found not guilty of a criminal offense by reason of insanity, may the committing judge impose conditions regarding subsequent discharge from the mental health facility of the individual?
Conclusion:	While the chief of medical services of the appropriate facility may later conditionally release the patient for periods not exceeding thirty (30) days, the committing judge is not authorized to impose conditions regarding subsequent discharge of the individual.

G.S. 122-84.1(a), as amended by the 1973 Session (Second Session, 1974) of the General Assembly, makes provision for committing defendants who have been acquitted "on grounds of mental illness" but who are dangerous to themselves or others because of the mental illness. This Section provides that, with certain exceptions not pertinent here, the commitment hearing shall be conducted in accordance with G.S. 122-58.7--the Section within Article 5A of Chapter 122 of the General Statutes which provides procedures for involuntary commitment proceedings which are not complicated by the fact that the respondent has been a criminal defendant.

Additionally, G.S. 122-84.1(a) contains the following significant language:

"If the court finds that the defendant-respondent is mentally ill and imminently dangerous to himself and others, it shall order him committed to a regional psychiatric facility designated by the Division of Mental Health Services for a period of not more than 90 days. *The defendant shall thereafter be considered as though he had been committed initially under the provisions of Article 5A of this chapter.* If the court finds that the defendant is not mentally ill and imminently dangerous to himself or others, it shall order his discharge." (Emphasis supplied)

In view of these provisions, the following language from Article 5A furnishes the answer to the question posed:

"§122-58.13. *Release and conditional release.*–The chief of medical services of a public or private mental health facility shall discharge a committed respondent unconditionally at any time he determines that the patient is no longer in need of hospitalization. He may also release a respondent conditionally, for periods not in excess of 30 days, on specified medically appropriate conditions. Violation of the conditions is grounds for return to the releasing facility. A law enforcement officer, on written request of the chief of medical services of the facility, shall take a conditional releasee into custody and return him to the facility. Notice of discharge and of conditional release shall be furnished the clerk of superior court of the county of commitment, and the county in which the facility is located."

Nothing in this opinion should be construed as indicating that the committing judge does not have the authority to order outpatient treatment of the respondent rather than inpatient treatment, with the further authority to order a supplemental hearing in the event that the respondent fails to adhere to the prescribed outpatient treatment program. See G.S. 122-58.8.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

27 September 1974

Subject: Insurance; Title Insurance; Attorneys; Proceeds from Title Insurance Agency; G.S. 58-135.1

Requested by: Mr. Glenn W. Brown
Counselor
30th Judicial District
North Carolina State Bar

Question: Attorneys A, B and C form X corporation for the operation of a title insurance agency. Stock is issued in equal shares to A, B and C. X corporation has a separate and distinct staff and office for its operations. X enters into a title insurance agency agreement with Y, a duly licensed title insurance company in North Carolina. Thereafter, A, B and C, from time to time, examine title to real property and apply to X for the issuance of a title insurance policy from Y. X, as agency for Y, issues the policy and collects the premium. Under the agency contract with Y, X receives a commission. After the payment of all expenses in connection with the operation of X, the Board of Directors of X declare dividends which are paid to A, B and C. The dividends are paid on the basis of stockholder interest only and without regard to which lawyer produced the most title insurance business. Are lawyers A, B and C guilty of violating G.S. 58-135.1?

Conclusion: No.

In 1974, the second session of the 1973 General Assembly of North Carolina enacted G.S. 58-135.1. Subsection (a) of that statute makes it unlawful for attorneys and certain others involved in rendering services incident to real estate settlements or sales to "...pay or

receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of such sale or settlement...." It is a misdemeanor to violate the provisions of the statute, and a violator is subject to a fine of not more than $1,000 and imprisonment for not more than six months.

The quoted portion of subsection (a) is broad, and, by itself, might appear to prohibit transactions such as those set out in the facts stated above. However, subsection (c) presents an exception to the statute's operation:

> "No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent."

Criminal statutes, such as G.S. 58-135.1, must be strictly construed. *State v. Gainey*, 273 N.C. 620, 160 S.E. 2d 685; *State v. Garrett*, 263 N.C. 773, 140 S.E. 2d 315; *Milk Producers Co-op. v. Melville Dairy, Inc.*, 255 N.C. 1, 120 S.E. 2d 548; *State v. Mitchell*, 217 N.C. 244, 7 S.E. 2d 567; *State v. Ingle*, 214 N.C. 276, 199 S.E. 10; *State v. Railroad*, 168 N.C. 103, 82 S.E. 963. The strict construction is to be applied against the State and in favor of potential defendants. *State v. Scoggin*, 236 N.C. 1, 10, 72 S.E. 2d 97.

The exception, subsection (c), which exempts stock ownership in a title insurance company or agency from the operation of the statute, is to be more liberally construed under the usual rules of statutory construction. See 73 Am. Jur. 2d, "Statutes", §313. When the Legislature enacted G.S. 58-135.1, it provided an express exception for those who might otherwise be guilty of violating the statute "solely by reason of ownership of stock." The word "solely" in the present context means "only". 39 *Words and Phrases* pp. 604-605. Thus, the statute says that if the only thing someone who is involved in a real estate transaction described by the statute has done is to own stock in a title agency or insurance company, that person cannot be found guilty of violating the statute. Clearly, when the Legislature exempted such ownership of stock, it included the normal incidents of stock ownership such as sharing in profits within that exemption.

In the present factual situation, attorneys A, B, and C have formed a separate and distinct corporation and will share in the profits or losses of that corporation according to their capital contribution and not according to any business generated by them. The corporate agency will presumably be open for dealings with others in order to avoid a possible violation of the provisions of Chapter 75 of the General Statutes for refusing to deal. The actions of A, B, and C in forming the corporation and in owning its stock would appear to be specifically exempt from the provisions of G.S. 58-135.1.

James H. Carson, Jr., Attorney General
Charles A. Lloyd
Assistant Attorney General

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3 October 1974

Subject: State Departments, Institutions and Agencies; North Carolina Department of Correction; Division of Youth Development; Authority to Provide for Coeducational Youth Development Schools

Requested by: Mr. David L. Jones
Secretary
Department of Correction

Question: Does the Department of Correction, through the Division of Youth Development, have the authority to administer Youth Development schools on a coeducational basis?

Conclusion: The Department of Correction has the authority to administer Youth Development schools on a coeducational basis.

Under N.C.G.S. 134-2, the State Department of Youth Development is empowered to administer Youth Development schools and institutions in such a manner as to best promote the interest of

the delinquent boys and girls committed to its care. Pursuant to the statutory authority contained in N.C.G.S. 134-2, students may be transferred from one school to another. A legislative restriction upon this general delegation of power is that no Youth Development school can be consolidated or abandoned. By the terms of the State government reorganization, the Department of Youth Development retains its powers but becomes the Division of Youth Development and is itself administered by the Department of Correction. N.C.G.S. 143A-166; 1973 Session (2d Session, 1974) Chapter 1262, House Bill 1129, to be codified as N.C.G.S. 143B-266.

The Division of Youth Development and the Department of Correction have determined that more effective rehabilitative treatment can be achieved if Youth Development schools are made coeducational. The agency has made plans to effectuate this goal. This is a matter which has been left to agency discretion by law. The Secretary of the Department of Correction clearly has the authority to make these schools coeducational. Such a move is not a "consolidation" or "abandonment" within the meaning of the statute provided that each Youth Development school will continue to function as such and will retain its legislated identity.

The Department of Correction, through the Division of Youth Development, has the authority to administer Youth Development schools on a coeducational basis.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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3 October 1974

Subject: Parole Officers; Parole: Arrest

Requested by: Mr. James Peeler Smith
Senior Administrative Assistant
Department of Correction

Questions: (1) May a parole officer arrest without a warrant prior to notifying the Parole

Commission a parolee who is violating the law?

(2) May a parole officer arrest without a warrant prior to notifying the Parole Commission a parolee who is violating a condition of his parole?

(3) May a parole officer arrest a parolee based on probable cause that the parolee has (a) committed a felony, (b) committed a misdemeanor, (c) violated a condition of his parole?

Conclusions: (1) No.

(2) No.

(3) No.

Although a parole officer is a State official clothed with some of the responsibilities of law enforcement officers, it is clear that a parole officer is not a law enforcement officer. See *State v. Stancill*, 128 N.C. 606 (1901) (superintendent of a convict gang is not a law enforcement officer); *State v. Burnett*, 183 N.C. 703 (1922) (federal prohibition officer derives no power from state statutes); *Gowens v. Alamance County*, 216 N.C. 107 (1939) (jailer has no authority by virtue of his office to serve process or make arrest).

In *State v. Taft*, 256 N.C. 441 (1962), officers appointed by a county board of alcoholic control were authorized to act as law enforcement officers "in suppressing a violation of the prohibition law..." The power of these alcoholic control enforcement officers was solely derived from the authority granted them by statute. Likewise, the authority of a parole officer to assume specific law enforcement functions is solely derived from statutory authority. That authority is found in N.C.G.S. 148-54 which provides that parole officers:

> "...shall, under the direction of the Board of Paroles and under regulations prescribed by it exercise supervision and *authority* over paroled prisoners, assist

> paroled prisoners, and those who are to be paroled in finding and retaining self-supporting employment, and to promote rehabilitation work with paroled prisoners, to the end that they may become law-abiding citizens. The supervisors shall also, under the direction of the Board of Paroles, maintain frequent contacts with paroled prisoners and find out whether or not they are observing the conditions of their paroles, and assist them in every possible way toward compliance with the conditions of their paroles..." (Emphasis added)

Any authority that a parole officer may have in regard to the arrest of a parolee stems from the "authority" that N.C.G.S. 148-54 requires the parole officer to exercise over the parolee. While an argument can be made that the parole officer's "authority" extends to include the power of arrest, there is substantial and compelling weight against such an interpretation.

N.C.G.S. 148-61.1(b) provides in part that "...Upon issuing such order of conditional or temporary revocation, such parolee may be arrested without warrant by any peace officer or parole officer..." If parole officers already had arrest power by virtue of their "authority", the authorization of N.C.G.S. 148-61.1(b) would be superfluous.

Furthermore, N.C.G.S. 15-205 provides in part that "...A probation officer shall have, in the execution of his duties, the powers of arrest and, to the extent necessary for the performance of his duties, the same right to execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State." The General Assembly found it necessary to give probation officers arrest power. By clear implication, similar specific authorization would be necessary to also give parole officers this power. However, there is no such authorization.

The "authority" granted in N.C.G.S. 148-54 is simply not broad enough to give parole officers general arrest power. Therefore, in situations in which the Parole Commission has not issued a revocation order pursuant to N.C.G.S. 148-61.1(b), the parole officer possesses no greater power of arrest than a private citizen would have under the same circumstances.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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3 October 1974

Subject: State Departments, Institutions and Agencies; University of North Carolina; Student Activities Fee

Requested by: Mr. David Edwards
Special Assistant
Office of the President
University of North Carolina

Question: May students at a State-supported institution elect to provide North Carolina Public Interest Research Group - a nonprofit corporation under the laws of North Carolina - with funds from the corpus of the student activities fee fund?

Conclusion: Given the specific funding process under consideration, and the corporate character of North Carolina Public Interest Research Group, students at a State-supported institution clearly may elect to provide North Carolina Public Interest Research Group with funds from the corpus of the student activities fee fund.

By statute, the Board of Governors of the University of North Carolina sets tuition and required fees at the constituent institutions. N.C.G.S. §116-11(7). The Board also is authorized to delegate any part of its authority over the affairs of any institution to the Board of Trustees or, through the President, to the Chancellor of the institution in any case where such delegation appears necessary or prudent to enable the institution to function in a proper and expeditious manner. Any such delegation may be rescinded by the Board of Governors at any time in whole or in part. N.C.G.S. §116-11(13).

The student activities fee is a required fee within the meaning of the statute. In practice, the Board of Governors "sets" this fee after hearing from the constituent institution that the amount of the fee is consistent with the needs and desires of the students as those needs and desires are properly expressed by the Student Government Organization at the constituent university. (Although the Board of Governors does undoubtedly have the power to alter the amount of the student activities fee without the request or consent of the Student Government of the University, or of the University itself, the Board of Governors traditionally has set the fee with an eye on the needs and desires of the students at the constituent university.) The expenditure of the fund created by the fee has been left to the discretion of the students consistent with the laws of the State and the specific Constitution under which their Student Government operates. In fact, the Board of Governors' predecessor, the Board of Trustees, has specifically authorized various student governments to allocate among the several student organizations and activities the funds derived from the student activities fee. Normally, such funds are expended to support the Student Union, to support various clubs and organizations at the University as well as other activities which the students - through their governing body - desire to participate in or support. (These findings are consistent with the findings of the United States District Court for the Middle District of North Carolina, Durham Division, in the case of *Arrington v. Taylor*, No. C-220-D-72, often referred to as the *Daily Tar Heel* Case.)

The Attorney General can find no legal impediment to the allocation of funds from the student activities fee to N. C. PIRG. Moreover, in view of the corporate character of N. C. PIRG and in view of the specific funding process proposed, this Office finds that such an expenditure is proper and will only be made upon a clear showing that the students at a constituent institution are desirous of participating in and helping finance N. C. PIRG.

N. C. PIRG was incorporated on April 20, 1972 under the North Carolina Nonprofit Corporation Act. As such, it is exempt from federal income tax. The purposes for which the Corporation is organized are:

> A. To engage in nonpartisan analysis, study and research of issues of general public interest such as environmental preservation and consumer protection;

B. To make available to the public the results of the nonpartisan analysis, study and research;

C. To articulate and pursue through public education, the institutions of education, government, the media and the courts the concerns of students on issues of general public interest.

N. C. PIRG will accept no funds from a constituent institution unless there is demonstrated sufficient study body-wide support for its operations. What this presently means is that before N.C. PIRG can accept funds it must be shown either that:

1. More than 50% of the entire student body have signed a petition indicating that they desire to assign $3.00 out of their yearly student activities fee to N.C. PIRG

or

2. More than 50% of those students voting in a properly called for referendum have indicated that they desire to assign $3.00 out of their yearly student activities fee to N. C. PIRG.

Even when the conditions expressed in either (1) or (2) above are met, only the money of those who so choose to participate will be allocated to N. C. PIRG. In essence, participation in the funding of N. C. PIRG by students at State institutions is entirely voluntary and comes about only through the expression of the will of the majority of the students at a given institution.

Given the specific funding process proposed and the corporate character of the entity proposed to be funded, it is clear that as a matter of law students at a State-supported institution may elect to provide N. C. PIRG with funds from the corpus of the student activities fee fund.

James H. Carson, Jr., Attorney General
Raymond L. Yasser
Associate Attorney

3 October 1974

Subject:	Municipal Corporations; Public Officers, Dual Office Holding, Conflict of Interest. Member of Town Aldermen Serving as Member of the Town's Auxiliary Police - G.S. 160A-284, G.S. 160A-282
Requested by:	Mr. William W. Staton Town Attorney Carrboro
Question:	May a member of the Board of Aldermen serve as a member of the town's auxiliary police when such officer receives no compensation?
Conclusion:	No. G.S. 160A-284 authorizes an auxiliary policeman to hold concurrently another appointive office, but it does not authorize him to hold concurrently an elective office. In addition, it is contrary to the policy of the law for an officer who has the appointive power, or a board having appointive power, to appoint himself or a member of the board to the office.

G.S. 128-1.1(b) authorizes a person who holds an elective office in State or local government to hold concurrently one other appointive office in either State or local government. However, G.S. 160A-284 authorizes a police officer, including an auxiliary policeman, to hold concurrently any other appointive office pursuant to Article VI, Sec. 9 of the Constitution.

Where there are two statutes dealing with the subject matter, one of which is special or particular, and the other is general, the particular statute will be construed as controlling unless it clearly appears that the General Assembly intended for the general act to control. Strong, *N. C. Index 2d.*, Statutes, Sec. 5.

Applying this principle, we conclude that G.S. 160A-284 is

controlling and authorizes an auxiliary policeman to hold only another appointive office, and not an elective office, concurrently.

It is contrary to public policy for an officer or board having the appointive power to appoint himself, or a member of the board, to the office. Thus, a member of an appointing board is ineligible for appointment by the board even though his vote is not required for a majority vote, or though he was not present. 67 C.J.S. *Officers*, Sec. 20.

Even if the policeman does not receive pay, it is possible that the aldermen may be in violation of G.S. 14-235, since G.S. 160A-282 grants all powers, privileges, and immunities afforded by law to regularly employed policemen, including benefits under the Workmen's Compensation Act.

Thus, we conclude the alderman would not be eligible to serve as an auxiliary policeman of the Town.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General

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3 October 1974

Subject: Mental Health; Courts; Authority of Trial Judge to Direct Verdict of Not Guilty By Reason of Insanity

Requested by: Dr. Bob Rollins
Director, Forensic Services
Division of Mental Health Services
N. C. Department of Human Resources

Question: In a criminal trial by jury may a judge direct a verdict of not guilty by reason of insanity?

Conclusion: In a criminal trial by jury a judge may not

direct a verdict of not guilty by reason of insanity.

Of course, the trial judge is normally authorized to direct a verdict of not guilty in a criminal trial by jury. However, in order to justify such an action, the judge must determine that there is not sufficient evidence to warrant submitting the case to a jury for a factual determination of the defendant's guilt. *State v. Spencer*, 281 N.C. 121, 128-129 (1972); *State v. Glover*, 270 N.C. 319, 322 (1967); *State v. Wiley*, 242 N.C. 114, 115 (1955).

In the present situation, though, when a trial judge specifically predicates his determination on the "insanity" of a defendant, then a wholly different picture is presented. In order to totally exculpate a North Carolina defendant from culpability for his crime, his mental condition at time of the offense must have been such that he was incapable of distinguishing between right and wrong due to a mental disease or disorder. *State v. Jones*, 278 N.C. 259, 266 (1971); *State v. Propst*, 274 N.C. 62, 70 (1968).

The cornerstone of American criminal jurisprudence is the precept that an individual is presumed to be innocent until his guilt is proven beyond a reasonable doubt, with the burden of sustaining such proof being levied upon the prosecution. Nevertheless, as affecting the affirmative defense of lack of mental responsibility, the defendant in a criminal trial is initially presumed to be sane. *State v. Hicks*, 269 N.C. 762, 763 (1967); *State v. Creech*, 229 N.C. 662, 674 (1949); *State v. Cureton*, 218 N.C. 491, 494 (1940). Thus, notwithstanding the prosecution's burden of establishing the defendant's overall guilt beyond a reasonable doubt, the onus is on a defendant who raises a defense of lack of mental responsibility for his crime to prove such lack to the "satisfaction of the jury." *State v. Cash*, 219 N.C. 818, 820-822 (1941); *State v. Stafford*, 203 N.C. 601, 602 (1932). In evaluating the sufficiency of this proof, a "...jury alone is the judge of its satisfaction." *State v. Harris*, 223 N.C. 697, 703 (1943).

It has been well noted that psychiatry is not "an exact science" and that doctors rendering opinions on this subject "are not infallible." *In re Tew*, 280 N.C. 612, 619 (1972). As a result, the testimony of physicians, like other medical evidence introduced

bearing upon the defendant's mental condition, amounts to "...evidence only to be submitted to the jury." See *State v. Jones*, 191 N.C. 753, 760 (1926).

Undoubtedly, many cases will arise where the posture of the evidence will be such as to warrant acquittal of the defendant due to a lack of mental responsibility. However, in view of the initial presumption of the defendant's sanity and the burden of proof involved in the question presented, it would appear that the issue of the defendant's mental responsibility will always be one for factual determination by the jury rather than a legal determination to be made by the trial judge.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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3 October 1974

Subject: Courts; Juveniles; Mental Health; Authority of District Court Judge to Order Placement of Juveniles in Centers for Mentally Retarded

Requested by: Dr. Ann F. Wolfe
Deputy Director of Mental Retardation
Division of Mental Health Services
N. C. Department of Human Resources

Question: Does G.S. 7A-286 authorize a district court judge exercising juvenile jurisdiction to commit a juvenile to a North Carolina center for mentally retarded?

Conclusion: G.S. 7A-286 does not authorize a district court judge exercising juvenile jurisdiction to commit a juvenile to a North Carolina center for mentally retarded.

This Office has previously had occasion to discuss the authority vested in a district court judge to effect placement of children in North Carolina centers for mentally retarded. See 43 N.C.A.G. 163 (1973) and 43 N.C.A.G. 231 (1973). Since the date of publication of those two opinions, by an amendment effective July 1, 1974, the North Carolina General Assembly has deleted the last two sentences of G.S. 7A-286(6) and substituted therefor the following language:

> "If the court believes, or if there is evidence presented to the effect that the child is mentally ill or is mentally retarded the court shall refer the child to the area mental health director or local mental health director for appropriate action. In no case will a child be committed directly to a State hospital or mental retardation center. The area mental health director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the child and mobilizing resources to meet the child's needs. If institutionalization is determined to be the best service for the child, then admission shall be with the voluntary consent of the parent or guardian; provided, that the consent of the parent or guardian shall not be required in those cases wherein the alternative to admission to a State Hospital or Mental Retardation Center in (sic) the commitment of the child to a juvenile corrections facility."

In the prior opinions cited it was stressed that the placement of a child in a treatment facility (including a center for mentally retarded) should be "in keeping with the needs of the individual juvenile and the expression of the intent of the General Assembly relative to the basic purpose for which the treatment facility involved has been established." See opinions cited at pages 166 and 233, respectively. Further, Article 9 of Chapter 122 (which provides for admission of persons to the centers for mentally retarded) has not and does not now contain any provision for court directed commitment to the centers.

As a result, it appears patent that the General Assembly by this latest amendment has, in unambiguous language, dispelled any question as to the authority of the court to order commitment of

a juvenile to one of the centers. The clear language of the present statute requires admission only upon application as provided in Article 9, with the responsibility for applying being placed upon the "area mental health director or local mental health director", and with the necessity for parental consent depending upon the existence of the circumstances as described in G.S. 7A-286(6).

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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3 October 1974

Subject: Contracts; Conflict of Interest; Public Officers, City Contracting With Corporation in Which Councilman is Officer - Void Contract

Requested by: Mr. Charlie B. Casper
Attorney
City of Asheboro

Question: May a city award a contract to the lower bidder, where the bids are requested through competitive bidding pursuant to statute, when it appears that a member of the City Council is an officer of the corporation submitting the low bid?

Conclusion: No. G.S. 14-234 provides: "If any person, appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly

or jointly with another, he shall be guilty of a misdemeanor." The Supreme Court has held that such a contract is void, and the councilman would be in violation of G.S. 14-234.

A city, pursuant to statute, let competitive bids for construction work. Several firms bid on the project and the low bid was submitted by a corporation in which one member of the City Council was an officer.

In the case of *Insulation Company v. Davidson County*, 243 N.C. 252, the Court stated:

> "The General Assembly is the policy-making agency of our Government, and, in adopting this Act, it made the condemnation of the transactions embraced within the terms thereof a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to 'feather their own nests' by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like.
>
> The statute simply recognizes that 'No man can serve two masters.' Matthew 6:24; *Davidson v. Guilford*, 152 N.C. 436, 67 S.E. 918; *Snipes v. Winston*, 126 N.C. 374.
>
> 'This law was enacted to enforce a well-recognized and salutary principle, both of the moral law and of public policy, that he who is entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself.' *State v. Williams*, 153 N.C. 595, 68 S.E. 900.
>
> The prohibition of G.S. 14-234 extends to an officer of a corporation who makes a contract between the corporation and a municipality or a board of which he is a member. *State v. Williams, supra.*

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No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of criminal misconduct and which is in direct contravention of the public policy of the State. (Citations omitted)

Public office is a public trust, and this Court will not countenance the subversion thereof for private gain. Not only will it declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a *quantum meruit* basis. In entering into such contract a public official acts at his own peril and must suffer the loss incident upon his breach of his public duty. He may look in vain to the courts to aid him in his efforts to recoup his losses, due to the invalidity of the contract, on the grounds the public agency which he serves has been enriched by his misconduct.

In other words, this Court will not recognize or permit any recovery bottomed on the criminal conduct of a public official. To put it simply, the doors of the courts are closed to any individual, or firm in which he is financially interested, who engages in a transaction which comes within the language of the statute. *Snipes v. Winston, supra; Davison v. Guilford, supra; King v. Guilford* 152 N.C. 438; *State v. Williams, supra.* Annos. 84 A.L.R. 969, 110 A.L.R. 164, 154 A.L.R. 375; 12 A.J. 498." (at 254, 255)

In *State v. Williams*, 153 N.C. 596, the Court said:

"This law was enacted to enforce a well-recognized and salutary principle, both of the moral law and of public policy, that he who is entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself.

This rule has its foundation in scriptural teaching, that no man can serve two masters, and is recognized and enforced in nearly all well-governed countries. As is said by Judge Dillon: 'The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle.'

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Whether the defendant had actual knowledge of the transaction is immaterial. Occupying the official positions he held in the corporate body and in its working department, the law will hold him to a knowledge of its transactions with the city of which he was an alderman. The fact that he retired from the meeting when the board of aldermen audited and paid the bill does not change the character of the transaction.

Nor is it necessary to show that defendant directly profited by the contract. In *Doll v. State*, 45 Ohio St., 445, it is held that: 'To become so interested in the contract, it is not necessary that he make profits on the same. But it is sufficient if, while acting as such officer, he sell the property to the city for its use, or is personally interested in the proceeds of the contract of sale, and received the same, or part thereof, or has some pecuniary interest or share in the contract.'

A case directly in point is *Com. v. DeCamp*, 177 Pa. St., 112, where it is held: 'The secretary, who is a stockholder of a corporation having a contract for the lighting of a city, is within the prohibition of Crimes Act, 1860, sec. 66, prohibiting any councilman from being interested in any contract with the city, though

he was elected councilman after the execution of the contract.' Upon the special verdict the defendant was properly adjudged guilty." (at 599-600)

Although we find no case dealing with the effect of competitive bidding upon G.S. 14-234, we do not believe that this fact would make the contract legal or the councilman free from prosecution under G.S. 14-234.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General

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3 October 1974

Subject: Mobile Homes; State Building Code; Local Minimum Housing Code, Applicable to Mobile Homes, Except as to those Items Required to be Pre-inspected During Manufacturing Process; G.S. 143-138; G.S. 143-144, et seq.

Requested by: Mr. William P. Pope
County Attorney
Iredell County

Questions: (1) Does a county have the authority to make the North Carolina Uniform Residential Building Code applicable to mobile homes?

(2) Are local minimum housing codes applicable to mobile homes?

Conclusions: (1) The Commissioner of Insurance and the North Carolina State Building Code Council are required to promulgate rules and regulations to provide safety and protection to owners and users of mobile

homes relating to structural features, plumbing, heating, electrical and air-conditioning systems, and the materials used in the construction of mobile homes. When a "Label of Compliance" has been attached to a mobile home, then the Residential Building Code is not applicable as to these features. However, the Residential Building Code is applicable as to the electrical hookup, water and sewage hookup and requirements, tie downs, foundations and other matters in the Code which are not superseded by the Uniform Standards Code for Mobile Homes adopted pursuant to Article 9A of Chapter 143 of the General Statutes.

(2) G.S. 160-441 authorizes cities and counties to adopt minimum housing standards to ensure that buildings used and occupied for human habitation are fit for that purpose. Whereas the Building Code relates to construction, the Housing Code is to maintain dwellings used for human habitation fit for that purpose. Therefore, a county minimum housing code is applicable to mobile homes when they are unfit for human habitation due to dilapidation, defects increasing the hazards of fire, accidents or other calamities, lack of ventilation, light or sanitary facilities, or due to other conditions rendering the dwelling unsafe, unsanitary, dangerous or detrimental to the health, safety, morals or otherwise inimical to the welfare of the residents of the county.

James H. Carson, Jr., Attorney General
James F. Bullock
Deputy Attorney General

15 October 1974

Subject: Mental Health; Transfer of Mentally Ill Person or Inebriate to N. C. Mental Health Facility from Another State; Duration of Detention of Transferred Patient and Nature of Additional Commitment Proceedings Required

Requested by: Dr. N. P. Zarzar
Director
Division of Mental Health Services
N. C. Department of Human Resources

Questions: (1) In view of the provisions of Articles 4 and 5A of Chapter 122, may a mentally ill or inebriate person returned to North Carolina pursuant to G.S. 122-40 still be held in a State mental health facility for a period not exceeding 30 days without additional proceedings being instituted?

(2) In the case of a mentally ill or inebriate person returned to North Carolina pursuant to G.S. 122-40, what nature of proceedings are required in order to hold him in a North Carolina mental health facility for a period exceeding the initial 30 days?

Conclusions: (1) A mentally ill or inebriate person returned to North Carolina pursuant to G.S. 122-40 may be held in a State mental health facility for a reasonable period not exceeding 30 days without additional proceedings being required.

(2) In order to hold a mentally ill or inebriate person who has been returned to North Carolina pursuant to G.S. 122-40 in a mental health facility for a period in excess of 30 days, application for voluntary

admission must be presented or new involuntary commitment proceedings must be instituted.

G.S. 122-40, in its present form, provides as follows:

> "§122-40. *Transfer of mentally ill citizens of North Carolina from another state to North Carolina.*--The Department of Human Resources is authorized, upon being satisfied by report of residence investigation made by the Department of Human Resources that person hospitalized in a State hospital for the mentally ill in another state is a resident of this State, to authorize such a person to be returned to the appropriate institution in this State at the expense of the sending state. The hospitalization of an alleged mentally ill person or an alleged inebriate in another state and the authorization by the Department of Human Resources for his return shall be sufficient authority for the administrator of the appropriate State hospital in this State to hold this patient for a reasonable period not to exceed 30 days. During this time hospitalization procedures for temporary observation and treatment may be initiated as provided for in Article 7 of this Chapter, without the removal of the patient from the hospital."

Articles 4 and 5A of Chapter 122, as ratified by the General Assembly in 1974, contain the specific requirements for voluntary admission and involuntary commitment to mental health facilities within the State of North Carolina. Inasmuch as the basic provisions of G.S. 122-40 antedate this 1974 legislation, the question has arisen as to whether the provisions of that Section--and particularly those authorizing a patient to be held for a period not exceeding 30 days--are still valid. Review of all of the statutes in question reveals that they are complementary to each other rather than contradictory in nature.

The provisions of G.S. 122-40 are clearly limited to situations involving North Carolina citizens who have been voluntarily admitted or involuntarily committed to mental health facilities in another

state pursuant to the statutes of that state. Articles 4 and 5A are obviously intended to provide the specific requirements for situations wherein the admission or commitment is initiated within this State, or where a continuation of the commitment which has been initiated in this State is to be continued. G.S. 122-40 contains a specific, unambiguous limitation as to the period of time a patient transferred to this State can be held without additional proceedings being instituted. In view of all factors involved in this type of situation–including those automatically to be expected to arise from the geographical location of personnel conversant with the patient's prior activities, condition and treatment--the time period prescribed appears to be intended as a valid, realistic exception to the processing time standards levied by Articles 4 and 5A. In view of the ramifications to be expected in these types of situations, it is certainly not an unjustifiable provision and is not, *per se*, violative of the Constitutional rights of the patients involved.

It is emphasized that the statute does not give *carte blanche* for the detention of all transferred patients for 30 days. What is contemplated is a diligent, prompt effort to determine and effect proper disposition of each patient compatible with his diagnosis and condition, but with the 30-day period being the outside limitation on retention of the patient without additional processing.

As to the nature of the additional proceedings, the only provisions in Article 5A for rehearing or recommitment proceedings deal with persons initially committed under present or prior North Carolina statutes. See G.S. 122-58.11 and G.S. 122-58.17. Thus, it would appear that retention of a returned patient of this type past the 30-day period prescribed would have to result from application for voluntary admission or initiation of new involuntary commitment proceedings. The last sentence of G.S. 122-40, in addressing the subject of continued hospitalization, refers to Article 7 of Chapter 122. That Article, which originally contained the provisions for Judicial Hospitalization, has been replaced by Article 5A. This presents no real problem, however, since the language of the sentence is permissive in nature and does not preclude use of Article 4 or 5A, where they are appropriate.

Significantly, though, this last sentence of the Section does appear to manifest a legislative intent that any hospitalization procedures

required be conducted at the hospital. It would seem that this language resulted from a recognition of long standing by medical, legal and legislative personnel that unnecessary transportation of a patient to various locations for required hearings can be expected to have a deleterious effect upon his condition. Thus, this language appears calculated to preclude such undesirable practices.

Here again, no conflict is encountered between the language of the various statutes. Article 5A permits the involuntary commitment hearing to be held in the county where the respondent is "found" and in "an appropriate room not used for treatment of patients at the mental health facility in which the respondent is being treated." See G.S. 122-58.3(a) and G.S. 122-58.7(f). Therefore, absent some cogent reason to the contrary, the legislative desire that proceedings be had at the mental health facility involved may be fulfilled within the statutory provisions currently contained in Chapter 122.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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15 October 1974

Subject: Facility Services; Licensing; Public Access to Licensure Records of Homes for the Aged and Infirm and Family Care Homes

Requested by: Mr. I. O. Wilkerson, Jr.
Director
Division of Facility Services
N. C. Department of Human Resources

Question: Is information pertaining to the licensing of homes for the aged and infirm and family care homes as contained in the licensure files of the Division of Facility Services available to the general public?

Conclusion: In general, information pertaining to licensed homes for the aged and infirm and family care homes, as contained in the licensure files of the Division of Facility Services, is available to the general public.

G.S. 132-1 defining public records and G.S. 132-6 prescribing public access thereto provide as follows:

> "*Public records defined.*–Public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business."
>
> * * *
>
> "*Inspection and examination of records.*--Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law."

With regard to the types of homes involved in the present question, G.S. 108-77 designates the Department of Human Resources as the major State department responsible for inspection and licensing, with such department acting under the rules and regulations of the Social Services Commission. This departmental licensing authority was subsequently delegated to the Division of Facility Services by the Secretary of Human Resources so that that Division is now responsible, *inter alia*, for maintaining the licensure records in question. See opinion of the Attorney General to Mr. I. O. Wilkerson, Jr., Director, Division of Facility Services, dated 16 August 1974 (44 N.C.A.G. 46). G.S. 108-77 makes no provision for confidentiality or privilege in maintaining these licensure records. Further, it is clear that, by their very nature, these records, in general, fall within the definition of "public records" as enunciated in G.S. 132-1.

One cautionary note is in order, however. G.S. 108-45 does prescribe rigid limitations on the disclosure, use, etc. of the names or other information "concerning persons applying for or receiving public assistance." It is quite likely that a number of the patients in the types of homes involved here would be the recipients of public assistance. Additionally, it is equally conceivable that the licensure files, in some instances, may contain some of the types of information which must be treated as confidential in accordance with G.S. 108-45.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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15 October 1974

Subject: Mental Health; Forensic Patients; Placing Potential Escapees in Seclusion

Requested by: Dr. Bob Rollins
Director
Forensic Services
Division of Mental Health Services
N. C. Department of Human Resources

Question: May a person who has been placed in the forensic unit at Dorothea Dix Hospital for evaluation of his mental competency to stand trial be placed in seclusion upon receipt of reliable information that he is planning an escape from the forensic unit?

Conclusion: Upon receipt of reliable information of his planned escape from the forensic unit a patient who is there for evaluation of mental competency to stand trial may be placed in seclusion if this is determined to be necessary action in order to prevent the escape.

Part 2, Article 3, Chapter 122 provides various rights to patients in North Carolina treatment facilities. Included in these basic rights is the provision that "...seclusion of a patient shall be employed only when necessary to prevent abuse or injury to himself or others, or as a measure of therapeutic treatment." See G.S. 122-55.3.

G.S. 122-36(g) and (m) define "treatment facility" and "patient", respectively. These definitions are all encompassing and do not distinguish between forensic units and patients admitted thereto and other units with mentally ill or inebriate patients. Thus, it is clear that the requirements of G.S. 122-55.3 afford forensic patients the same protection–no more and no less–than any other patient in North Carolina treatment facilities.

Of course, G.S. 122-55.3 does not specifically mention the planned escape by a patient as a basis for seclusion. However, pretermitting the impact of an escape upon a patient's "therapeutic treatment", common sense compels the conclusion that resultant danger to the patient or others is a necessary concomitant to any escape from a treatment facility (most particularly a forensic unit)and/or the succeeding efforts to return the escapee to custody. In an era when hostage taking and kidnapping are the most popular methods of informally securing premature release from constraint imposed by legal authorities, mere casual scanning of most any daily newspaper handily dispels any illusion that the average escape is achieved without danger to someone.

It is emphasized that the reliability of the information of the planned escape is a vital requisite to imposing seclusion for this purpose. Therefore, action of this nature should only be taken by mental health professionals who have received concrete information of the planned escape and who possess adequate expertise, experience and knowledge of the individual patient to adequately evaluate the credibility of the information received.

It is noted that the imposition of seclusion may automatically result in the loss of some of the basic rights granted to patients by G.S. 122-55.2. Therefore, responsible mental health professionals should be punctilious in insuring that the written recordation and the notification of various individuals are accomplished in accordance with G.S. 122-55.3 and G.S. 122-55.2, when appropriate.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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15 October 1974

Subject: State Departments, Institutions and Agencies; Reorganization; Relationship Between North Carolina Ports Authority and North Carolina Department of Transportation

Requested by: Mr. H. Y. Kinard
Assistant Secretary for Management
Department of Transportation

Question: Does the Secretary of the Department of Transportation have the authority to hire and fire and otherwise exercise control over the personnel of the State Ports Authority?

Conclusion: The Secretary of the Department of Transportation has this authority by the terms of the Executive Organization Act of 1971.

Article 22 of North Carolina General Statutes, Chapter 143, created the State Ports Authority. By the terms of this Article, the State Ports Authority was given broad powers to carry out its statutory purposes. In 1971, by the terms of the Executive Organization Act, the North Carolina State Ports Authority, as codified in Article 22 of Chapter 143 of the General Statutes and the laws of North Carolina, was transferred to the Department of Transportation by a "Type II" transfer. N.C.G.S. 143A-107.

By statute, a "Type II" transfer means the transferring intact of an existing agency, or part thereof, to a principal department.

When such a transfer occurs, the agency transferred is "administered under the direction and supervision" of the principal department.

The "management functions" of the transferred agency are performed "under the direction and supervision" of the head of the principal department. Management functions are defined as "planning, organizing, *staffing*, directing, coordinating, reporting and budgeting." (emphasis added) N.C.G.S. 143A-6(b) and (c).

Pursuant to G.S. 143A-6(b) and (c), the Secretary of the Department of Transportation, as head of that Department, has the authority to direct and supervise the management function of "staffing" as that function pertains to the State Ports Authority. This necessarily means that the Secretary of the Department of Transportation has the ultimate authority to hire and fire and otherwise exercise control over the Ports Authority's personnel. Although not required, it would appear to be the better practice for the Secretary to consult with the Ports Authority prior to making "staffing" decisions.

James H. Carson, Jr., Attorney General
Edwin M. Speas, Jr.
Assistant Attorney General

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15 October 1974

Subject:	Health; Counties; Definition and Abatement of Mass Gatherings as Nuisances
Requested by:	Mr. Robert C. Lewis County Attorney Lincoln County
Question:	May a county board of commissioners define a mass gathering lasting less than 24 hours as a nuisance?
Conclusion:	A county board of commissioners may not define a mass gathering lasting less than 24 hours as a nuisance.

The General Assembly enacted Article 28 of Chapter 130 of the General Statutes "to provide for the protection of the public health,

public welfare, and public safety of those persons in attendance at mass gatherings and of those persons who reside near or are located in proximity to the sites of mass gatherings or are directly affected thereby." (G.S. 130-240) "Mass gathering" is defined as a "congregation ... for a continuous period of at least 24 hours ...." (G.S. 130-241(1)) Therefore, Article 28 is inapplicable to a congregation lasting less than 24 hours. A county board of commissioners may adopt ordinances to "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county" and a county board of commissioners may adopt ordinances to "define and abate nuisances." (G.S. 153A-121(a)) "Nothing in (Article 28) shall be construed to limit the authority of counties to adopt ordinances under G.S. 153-9(55) regulating mass gatherings of less than 5,000 persons." (G.S. 130-248) Chapter 153 of the General Statutes was rewritten by 1973 Session Law Chapter 822 and the rewritten Chapter was codified as 153A; G.S. 153A-121 is similar to former G.S. 153-9(55).

"A nuisance is anything that by its use or by its permitted existence works annoyance, harm, inconvenience or damage to another"; a nuisance is a public nuisance "when it affects the rights to which every citizen is entitled" or when "it affects enjoyment and health of persons as part of (the) public". (*Words and Phrases*, "Nuisance") It has been observed that the term "nuisance" is "incapable of precise definition" but nevertheless is "a well understood term". (66 C.J.S., Nuisance, s. 1) That which is authorized by law cannot be a public nuisance and cannot be abated; however, it may be a private nuisance for which damages may be awarded. See 66 C.J.S., Nuisance, s. 7.

The General Assembly through enactment of Article 28 recognized that a mass gathering, as defined therein, necessitates special facilities, arrangements, and other provisions to protect the public health, welfare and safety. The General Assembly did not declare that such a mass gathering was *per se* deterimental to the public health, welfare and safety. G.S. 130-248 is a recognition of the limited applicability of Article 28 and the general authority of the counties to adopt ordinances pursuant to G.S. 153-9(55), now G.S. 153A-121. Although G.S. 130-248 specifically refers only to gatherings of less than 5,000 persons, the Section should not be

construed as a limitation of county authority. G.S. 153A-121 is a general grant of authority to the counties; Article 28 is a legislative response to a particular concern. G.S. 130-248 should be construed as stating a legal tenet rather than as limiting county jurisdiction in this area.

However, the authority of the counties under G.S. 153A-121 and the definition of "nuisance" should not be construed to render mass gatherings not subject to regulation under Article 28 subject to abatement. Rather, Article 28 and G.S. 153A-121 should be harmonized to effect legislative intent. Therefore, it is the opinion of this Office that a county pursuant to G.S. 153A-121 may regulate, but not abate, a mass gathering lasting less than 24 hours.

James H. Carson, Jr., Attorney General
Robert R. Reilly
Associate Attorney

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15 October 1974

Subject: Licenses and Licensing; Wastewater Treatment Plant Operators Certification Commission; (G.S. 90A-35 et seq. as amended by G.S. 143B-300); Considered to be an Occupational Licensing Board as Defined by G.S. 93B-1 et seq.

Requested by: Mr. William D. Bradshaw
Chief Fiscal Officer
Department of Natural and Economic Resources

Question: Is the Wastewater Treatment Plant Operators Certification Commission (G.S. 90A-35 et seq. as amended by G.S. 143B-300) considered to be an occupational licensing board as defined by G.S. 93B-1 et seq.?

Conclusion: Yes. The Wastewater Treatment Plant Operators Certification Commission is an

occupational licensing board as defined by G.S. 93B-1 et seq.

Article 3, Chapter 90A of North Carolina General Statutes (G.S. 90A-35 et seq. as amended by G.S. 143B-300) establishes a Wastewater Treatment Plant Operators Certification Commission in the Department of Natural and Economic Resources and gives it authority to establish minimum requirements of education, experience and knowledge for each grade of certification for operators of wastewater treatment plants. It gives the Commission authority to grant an applicant a certificate designating the level of his competence upon the applicant meeting certain appropriate requirements of the Commission. It provides that every person, firm or corporation, municipal or private, owning or having control of a wastewater treatment plant will have the obligation of assuring that the operator in responsible charge of such plant is duly certified by the Commission under the rules and regulations established by it. It further provides that the Commission may revoke the certificate of an operator when it is determined that the operator has practiced fraud or deception or has failed to meet some established requirements or is unable to properly perform his duties.

G.S. 93B-1 defines a "License" to mean any license, certificate, or other evidence of qualification which an individual is required to obtain before that individual may engage in or represent himself to be a member of a particular profession or occupation. It defines "Occupational licensing board" to mean any board, committee, commission, or other agency established in North Carolina for the purpose of regulating the entry of persons into or the conduct of persons in a particular profession or occupation and which is authorized to issue licenses.

Inasmuch as the Wastewater Treatment Plant Operators Certification Commission is authorized to issue a certificate certifying that an individual is competent to perform the duties of a wastewater treatment plant operator and is further authorized to revoke such certificate and to prohibit an individual from performing the duties of an operator in responsible charge of a wastewater treatment works without first being duly certified by the Commission, it necessarily follows that such Commission is an occupational licensing commission as defined by G.S. 93B-1 et seq..

James H. Carson, Jr., Attorney General
John R. B. Matthis
Assistant Attorney General

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15 October 1974

Subject: State Departments, Institutions and Agencies; Department of Correction; Division of Youth Development; Juveniles; Photographing Juveniles

Requested by: Mr. James P. Smith
Senior Administrative Assistant
Department of Correction

Question: May the Division of Youth Development of the Department of Correction lawfully take photographs of juveniles committed to its custody or does G.S. 114-19 prohibit such a procedure?

Conclusion: G.S. 114-19 does not prohibit the photographing of juveniles committed to the custody of the Division of Youth Development of the Department of Correction.

In a recent telephone conversation the opinion of this Office was requested on the subject of whether the Division of Youth Development of the Department of Correction is authorized to take the photographs of juveniles committed to its custody.

G.S. 114-19 authorizes the taking of photographs and fingerprints of any person charged with a felony or committed to jail or prison upon conviction of a crime. It also authorizes, under certain specific limitations, the taking of photographs of persons charged with misdemeanors. As in *State v. Accor*, 277 N.C. 65, 78, 175 S.E. 2d 583 (1970), "G.S. 114-19 neither authoriz(es) nor prohibit(s) the taking of the...photographs" herein in question.

A problem of this nature was presented in 40 N.C.A.G. 670. There, it was concluded that photographs of juveniles may not be taken while the juvenile is subject to the jurisdiction of the juvenile court, because a child may not be convicted of a "crime" by that court. This opinion spoke only to pretrial photographs, however, and rightly so. The statute in question is directed at chiefs of police and sheriffs, and not to the Department of Correction.

Post-confinement photographs present an entirely different question. Although Chapter 134, *Youth Development*, is silent on the subject, G.S. 148-76, *Duties of Record Section*, does require the Record Section of the Department of Correction to "maintain the combined case records and receive and collect fingerprints, *photographs*, and other information..." These records are confidential and only named parties have access to them. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E. 2d 638, aff'd, 281 N.C. 307, 188 S.E. 2d 347 (1972). See, also, opinion of Attorney General to Mr. David L. Jones, Secretary of Social Rehabilitation and Control, 42 N.C.A.G. 186 (1973).

N.C.G.S. 114-19 does not prohibit the photographing of juveniles committed to the Department of Youth Development and it is therefore the opinion of this Office that institutional officials may, for official use, photograph juveniles for record keeping purposes and also as a means of identification.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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18 October 1974

Subject: Courts; Costs; Special Proceedings; Suits *I Forma Pauperis*

Requested by: Mrs. Daphene L. Cantrell
Assistant Clerk of Superior Court
Mecklenburg County

Question: May a person institute a special proceedin *in forma pauperis*?

Conclusion: A person may institute a special proceedin *in forma pauperis.*

The conclusion that a person may institute a special proceeding *i forma pauperis* rests upon an analysis of a number of statutes which as stated in a comment in 49 N.C.L. Rev. 683 (1971), lack clarity and uniformity in treatment of the broad question of access to the judicial process by indigents.

The two principal statutes are G.S. 6-24 and G. S. 1-110, which are set out hereunder:

> "§ 6-24. *Suits in forma pauperis; no costs unless recovery*. - When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him."
>
> "§1-110. *Suit as a pauper; counsel.* - Any superior or district court judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the provisions of G.S. 1-109. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action."

In *Speller v. Speller*, 119 N.C. 356, 26 S.E. 160 (1896), the Supreme Court stated that The Code, Sections 210 and 212 (the latter now codified as G.S. 6-24), "not only exempts such pauper plaintiff from giving bond to indemnify the defendant for his costs, but excuses him from paying fees to any officer and deprives him of the right to recover costs." The Court noted that Chapter 149, Laws 1895, amended Section 212 to provide that "where a plaintiff, admitted to sue *in forma pauperis*, recovers in his action, he shall recover costs, and of course must pay them; for if he does not pay costs there is none he could recover." (at 210 and 211)

G.S. 1-110 specifies when a person may sue as a pauper. Two conditions are set out in the statute: first, a person must prove he has a good cause of action; and second, a person must be unable to comply with G.S. 1-109. G.S. 1-1 provides that there are two remedies in the courts of justice: actions and special proceedings. G.S. 1-2 defines an "action"; G.S. 1-3 defines a "special proceeding" as "every other remedy". The question becomes whether the term "cause of action" as used in G.S. 1-110 applies to both actions and special proceedings.

The term "cause of action" has been defined in many ways. "A 'cause of action' is the existence of those facts which give a party a right to judicial interference on his behalf." *United States v. Lance, Inc.*, 95 F. Supp. 327, 329 (1951). *Black's Law Dictionary* states that "(t)he cause of action is distinct from the 'remedy', which is simply the means by which the cause of action is satisfied." In Rule 8 of the North Carolina Rules of Civil Procedure, G.S. 1A-1, a pleading which sets forth a claim for relief is required to set forth a short and plain statement of the claim. In the official comment thereto, it is noted that the term "claim" was substituted for the old term "cause of action" to escape the problems associated with the former term but, alas, one "conundrum" may have been exchanged for another. In any event, it is apparent that a "cause of action" is a statement of facts to which a remedy may be afforded; and, therefore, G.S. 1-110 is applicable to both actions and special proceedings.

This conclusion is supported by the provisions of G.S. 1-109 which requires the plaintiff, upon motion of the defendant, to post bond or deposit funds as security for costs which may be awarded the defendant or to file written authority allowing the plaintiff to sue as a pauper. The failure to do one of the three "shall constitute grounds for dismissal of such civil action or special proceeding." The inference is clear that a plaintiff may sue as a pauper in a special proceeding.

As mentioned previously, all of the relevant statutes do not exhibit clarity on this matter. Article 28 of Chapter 7A of the General Statutes pertains to uniform costs and fees. G.S. 7A-305, pertaining to costs in civil actions, provides that the clerk shall collect the facilities fee and General Court of Justice fee as advance court costs

at the time of filing, except in suits *in forma pauperis*. G.S. 7A-306, pertaining to costs in special proceedings, provides that the fees are payable at the time the proceedings are initiated but does not provide an exception for suits *in forma pauperis*. G.S. 7A-311, pertaining to uniform civil process fees in civil actions or special proceedings, provides that "(a)ll fees shall be collected in advance (except in suits *in forma pauperis).*"

The absence of a specified exception in G.S. 7A-306 for suits *in forma pauperis* does not limit the import of G.S. 1-110 and G.S. 6-24. Statutes pertaining to similar or related matters must be harmonized to effect legislative intent. G.S. 1-110 affirmatively authorizes a person to sue as a pauper; G.S. 6-24 explicitly states that no officer shall require of such person any fee; G.S. 7A-306 should not be construed by negative implication to nullify these two statutes.

The Legislature has provided different standards for determining indigency in different matters. For example, a defendant, pursuant to G.S. 1-112, is not required to file an undertaking with sufficient surety in an action for the recovery or possession of real property if "he is unable to give and is not worth the amount of the undertaking in any property whatsoever." Nevertheless, it is the opinion of this Office that the Legislature, through the enactment of G.S. 1-110, empowered any superior or district court judge or clerk of the superior court to authorize a person to sue as a pauper either in a civil action or a special proceeding.

James H. Carson, Jr. Attorney General
Robert R. Reilly
Associate Attorney

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18 October 1974

Subject: Mental Health; Examination of Mentally Ill or Inebriate Person; Responsibility of County

Requested by: Mr. James R. Sugg
Craven County Attorney

Question: Is a county under a duty to pay for an examination of a mentally ill or inebriate person where such examination is ordered by a magistrate in an involuntary commitment proceeding?

Conclusion: The county is under a duty to pay for an examination of a mentally ill or inebriate person where such examination is ordered by a magistrate in an involuntary commitment proceeding.

G.S. 122-58.3(b) provides that if either the clerk or magistrate finds that the respondent is probably mentally ill or inebriate and imminently dangerous to himself or others, he shall issue an order to a law enforcement officer to take the respondent into custody for examination by a qualified physician. G.S. 122-58.14(a) provides that transportation to or from a regional hospital outside a county, for any purpose, is the responsibility of the county pursuant to G.S. 122-42.

G.S. 122-41 provides that expenses of examination and hospitalization shall be paid by the county of residence of an alleged mentally ill or inebriate patient and further provides for the recovery of such cost from the mentally ill or inebriate person if his estate is sufficient to bear the cost of such examination and hospitalization. Article 7 mentioned in this statute was repealed in 1973 and the procedures for involuntary commitment of mentally ill inebriate persons are contained in new Article 5A; when construed with G.S. 122-42, G.S. 122-43 and Article 5A of this Chapter, it is readily apparent that the Legislature intended these provisions to apply to Article 5A.

G.S. 122-42 provides that the cost and expenses of conveying every patient to any hospital from any county or removing him from the hospital to the county from which he was hospitalized or to the county of his residence when released shall be paid by the treasurer of the county of residence upon order of the board of county commissioners. This statute further authorizes a county, in proper instances, to later bring an action to recover such costs.

G.S. 122-43 (including an amendment changing the amounts of fees permitted as effected by Chapter 1408 of the 1973 Session of the General Assembly (2nd Session 1974)) provides in pertinent part as follows:

> "G.S. 122-43. *Fees and mileage for examination; payment.*–The fees listed below shall be allowed to the officers who make the examination and they shall be paid by the county in which the alleged mentally ill person or alleged inebriate has residence if the alleged mentally ill person or alleged inebriate, or one legally responsible for the support of such person, is unable to pay for the same.
>
> To the physicians making the examination, the usual and customary fees...."

Literal reading of G.S. 122-43 has apparently raised a question as to whether it prescribes that a determination of inability of the individual (or one responsible for him) to pay the fees be made *before* payment of the fees may be made by the county. Close scrutiny is convincing, however, that the basic purpose of G.S. 122-43 is to specify the amount of fees to be allowed and not to alter the unambiguous language of G.S. 122-41 and G.S. 122-42 requiring initial payment of fees by the county with the right reserved to later recover the amount expended in situations where recoupment is financially possible.

James H. Carson, Jr., Attorney General
Parks H. Icenhour
Assistant Attorney General

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18 October 1974

Subject: Administration of Estates; Guardian; Mental Patients; Appointment of Out-of-State Resident as Guardian

Requested by: Honorable Charlie T. McCullen Jr.
Clerk of Superior Court
Sampson County

Question: Where a person is declared incompetent to manage his own affairs under the provisions of Article 2, Chapter 35, of the General Statutes, may the clerk appoint as guardian or trustee for such incompetent person a nonresident of this State?

Conclusion: Where a person has been declared incompetent pursuant to the provisions of Article 2, of Chapter 35, of the General Statutes, the clerk may appoint only a resident of this State as trustee or guardian of such incompetent person.

G.S. 35-2.1 authorizes the clerk to appoint a guardian or trustee for a person adjudged insane or incompetent. G.S. 35-3.1 authorizes and empowers the clerk to appoint an ancilliary guardian in his county where a nonresident insane or incompetent person has a guardian appointed and serving for him in the State of his residence with respect to real property in North Carolina.

G.S. 33-9 authorizes and empowers the clerk of superior court to remove fiduciaries and to appoint successors, it being the duty of the clerk to remove a fiduciary who is likely to become a nonresident of this State.

Our Supreme Court has held that where infant grandchildren of a testator take upon a contingency as directed by a will properly probated in this State it is required that a guardian be a resident of this State. See *Cilley v. Geitner*, 182 N.C. 714, 110 S.E. 61 (1921). Similarly, Chapter 33, Article 7, of the General Statutes provides a procedure under which a foreign guardian may apply to and be granted under certain conditions the authority to withdraw his ward's estate to the place of foreign jurisdiction.

When the foregoing statutes are construed together, it becomes abundantly clear that the Legislature never intended a nonresident

to act as guardian or trustee for an incompetent person in this State. If it were otherwise, surely the clerk would not have been directed by G.S. 33-9(5) to remove a fiduciary who was likely to become a nonresident of this State.

James H. Carson, Jr., Attorney General
Parks H. Icenhour
Assistant Attorney General

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18 October 1974

Subject:	Prisons; Study Release
Requested by:	Mr. James P. Smith Senior Administrative Assistant Department of Correction
Question:	May inmates on study release who receive financial assistance be assessed a per diem charge representing the cost of their upkeep?
Conclusion:	No.

Pursuant to N.C.G.S. 148-33.1(f), inmates placed on work release may be assessed the cost of their upkeep. However, inmates are placed on study release under the provisions of N.C.G.S. 148-4 and N.C.G.S. 148-22.1, neither of which authorizes or requires the inmate who receives financial assistance as a result of his study release to pay the cost of his upkeep.

Absent enabling legislation, the only way in which the cost of upkeep might conceivably be charged an inmate on study release would be based on the argument that study release is merely another form of work release. However, such an interpretation is untenable. Study release, authorized by N.C.G.S. 148-4 and N.C.G.S. 148-22.1, is within the jurisdiction of the Secretary of Correction. Work release, authorized by N.C.G.S. 148-33.1, is within the jurisdiction of the Parole Commission. The programs are separate

and distinct. Therefore, without enabling legislation, no per diem charges may be assessed inmates on study release who are receiving financial assistance.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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22 October 1974

Subject: Health; Education; Immunization Requirements Detrimental to Child's Health

Requested by: Mr. Rodney Hobbs, Chief
Administrative Services Section
Division of Health Services
N. C. Department of Human Resources

Question: In a situation where the recommended administration of vaccine in a series of doses given at medically approved intervals will require a period in excess of 30 days, are the exemption provisions of G.S. 130-91 applicable so as to preclude the G.S. 130-90 requirement for excluding a child from school?

Conclusion: In the situation described, upon proper certification by a licensed physician that accelerated administration of a particular immunization is or may be detrimental to the child's health, exclusion of the child from school for want of proper immunization is not authorized during the medically approved period of time for administration of the vaccine.

G.S. 130-87 requires certain immunization of school children in North Carolina and vests in the Department of Human Resources the authority to "...adopt rules and regulations setting forth the required immunizations, the child's age for administering each vaccine, and the adequately immunizing doses." Current rules and regulations promulgated by the designee of the Department of Human Resources require a series of doses for some of the diseases specified. With regard to certain diseases sought to be prevented, it appears that standard medical practice requires that minimum periods of time expire between the administration of doses of vaccine. It further appears to be an accepted view in medical circles that administration of these vaccines more rapidly than medically recommended generally results in less than optimal antibody production by the immunized person, i.e., less than the maximum immunization otherwise achieved.

The present question has apparently arisen because of the rather stern language of G.S. 130-90. That statute, in general, requires presentation of a certificate of immunization by school children within 30 days of admittance to school and further provides:

> "No teacher or principal shall permit a child to continue in school after expiration of this 30-day period unless the parent, parents, guardian or person *in loco parentis* responsible for such child presents evidence of immunization as described previously in this section."

It is obvious that, in some instances, this 30-day limitation may not be complied with absent an accelerated administration of immunization. However, G.S. 130-91, which reads as follows, contains significant language which would appear to be pertinent to this problem:

> "§130-91. *Exemption for child's health.*–If any physician licensed to practice medicine in North Carolina certifies that a particular immunization required by this Article is or may be detrimental to the child's health, the requirements of this Article for that particular immunization shall be inapplicable for that child until it is found no longer to be detrimental to the child's health."

Patently, it was the intent of the General Assembly to provide for the welfare of school children. Pretermitting any question as to whether the parents should have, in good conscience, taken steps to secure the proper immunization of a particular child, the accomplishment of two ends should be paramount: (a) the maximum protection of the health of the child; and, (b) the proper education of the child. It would seem that only by a marriage of these two ends and by taking sensible steps to achieve them may the appropriate authorities truly fulfill their responsibilities.

Examined in this light, it would appear that a licensed physician would be justified in certifying that accelerated immunization contrary to accepted medical practices "is or may be detrimental to the child's health". It would further seem that proper certification of this type by a licensed physician would serve as a basis for a valid exception to the 30-day limitation and preclude removal of the child from school. This reprieve, of course, would be a temporary one lasting only until the end of the acceptable immunization period.

James H. Carson, Jr., Attorney General
William F. O'Connell
Assistant Attorney General

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1 November 1974

Subject: Prisons and Prisoners; Work Release; Union Activities

Requested by: Mr. James P. Smith
Senior Administrative Assistant
Department of Correction

Question: May an inmate on work release participate in union activities in conjunction with his employment?

Conclusion: Yes, upon the employer's premises during working hours, or if not during working hours, if approved by the Secretary of Correction.

N.C.G.S. 148-33.1, the North Carolina work release statute, is silent on whether or not work release inmates may join a labor union in conjunction with their free world employment. Because there is no express prohibition, we believe that a prisoner on work release in the free community may join, or choose not to join, a union on the same basis as a free person similarly employed.

To what extent the work release inmate may participate in union activities presents a different question. N.C.G.S. 148-33.1(d) provides that ". . . an eligible prisoner may be released from actual custody during the time necessary to proceed to the place of his employment, perform his work, and return to quarters designed by the prison authorities. . . ." Under the parameters of this section, an inmate on work release in the free community may be away from his confinement and therefore may participate in union activities, conducted on his employer's premises, only during his actual working hours. At the close of working hours, the inmate must ". . . return to quarters designated by the prison authorities. . . ."

It is still possible for the inmate to participate in union activities which occur before or after the hours of his employment, or at a location other than the place of his employment. N.C.G.S. 148-4, as amended by Chapters 902 and 1262 of the Session Laws of 1973, provides that:

> "The Secretary of Correction may extend the limits of the place of confinement of a prisoner, as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to
>
> * * *
>
> (6) Participate in community-based programs of rehabilitation, including, but not limited to the existing community volunteer and home-leave programs, and other programs determined by the Secretary of Correction to be consistent with the prisoner's rehabilitation and return to society."

Pursuant to N.C.G.S. 148-4, the Secretary of Correction is vested with the discretion to determine which programs are consistent with the prisoner's rehabilitation and return to society. The Secretary may therefore exercise his discretion and determine that union meetings and activities are consistent with the goals of rehabilitation and allow the inmate's participation, as an extension of the limits of confinement, in various union activities.

James H. Carson, Jr., Attorney General
Jacob L. Safron
Assistant Attorney General

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1 November 1974

Subject:	Public Officers and Employees; State Employees; Fourteenth Amendment; Personal Privacy
Requested by:	Mr. Al Boyles State Personnel Director
Question:	Can the State constitutionally dictate hair styles to be worn by State employees?
Conclusion:	Absent a compelling purpose, the State cannot dictate hair styles to be worn by State employees.

A public employee's constitutional right of personal privacy is protected by the Fourteenth Amendment. That personal privacy includes the right of an individual to choose his own hair style (including facial hair) has been determined by the Fourth Circuit Court of Appeals in *Massie v. Henry*, 455 F. 2d 779 (4th Cir., 1972), in which the Court stated that the "right to wear their hair as they wish (is)...an aspect of the right to be secure in one's person guaranteed by the due process clause...." 455 F. 2d at 783.

It is basic to our law that a state may not interfere with private rights except for legitimate governmental purposes. Such purposes

could relate to sanitation or safety, or to the avoidance of a bizarre or unreasonably distracting appearance. However, in the absence of a reasonable relationship between a requirement or regulation affecting a State employee's personal appearance, *i.e.*, his hair style, and some legitimate governmental purpose, such a requirement or regulation would be violative of the employee's constitutional rights.

James H. Carson, Jr., Attorney General
Ann Reed
Assistant Attorney General

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5 November 1974

Subject: Taxation; Ad Valorem Taxation; Classification; Real Property Belonging to Elks Club; G.S. 105-278(19)

Requested by: Mr. D. R. Holbrook, Director
Ad Valorem Tax Division
North Carolina Department of Revenue

Question: Does real property owned by an Elks Club, specifically its dining facilities and swimming pool, come within the provisions of G.S. 105-275(19)?

Conclusion: Dining facilities located within the lodge structure come within the provisions of G.S. 105-275(19), but a swimming pool does not.

It appears that an Elks Club owns a parcel of real property on which is located the building in which its members hold their lodge meetings. The building includes a dining room and a kitchen, as well as rest rooms and other adjacent spaces within the structure, such as hallways and porches, which are necessary for the convenient use of the building as a lodge or meeting place. There is also a swimming pool on the property separated from the building.

Inquiry has been made whether the real property owned by the Elks Club, including its dining facilities and swimming pool, comes within the provisions of G.S. 105-275(19).

The applicable statute, G.S. 105-275, provides in part:

> "The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed or taxed:
>
> . . .
>
> (19) Real and personal property belonging to ... the Benevolent and Protective Order of Elks ... when used exclusively for meeting or lodge purposes by said organization, together with such additional adjacent real property as may be necessary for the convenient normal use of the buildings thereon. Notwithstanding the exclusive-use requirement hereinabove established, if a part of a property that otherwise meets this subdivision's requirements is used for a purpose that would require that it not be listed, appraised, assessed or taxed if the entire property were so used, that part, according to its value shall not be listed, appraised, assessed or taxed. The fact that a building or facility is incidentally available to and patronized by the general public, so far as there is no material amount of business or patronage with the general public, shall not defeat the classification granted by this section."

The essential question to be decided is whether the dining facilities and the swimming pool meet the test of being "used exclusively for meeting or lodge purposes". To make this determination, the terms "meeting" and "lodge" must be defined. *Webster's Third New International Dictionary* (1961) defines "meeting" as "an act or process of coming together: as ... a gathering for business, social or other purposes ... a place of meeting." *Buckholz v. Board of Adjustment* (1972), 199 N.W. 2d 73, states that a meeting is "a coming together of persons; an assembly." *American Brass v. Ansonia Brass Worker's Union* (1953), 140 Conn. 457, 101 A. 2d

291, states that "A meeting is an assembling of a number of persons for the purpose of discussing and acting upon some matter or matters in which they have a common interest." A meeting is "a number of people having a common duty or function who have come together for any legal purpose, or the transaction of business of a common interest; and assemblage." *People v. Mintz* (1930), 106 A. 725, 290 P. 93.

Concerning the meaning of the term "lodge", *Ange v. Woodmen* (1916), 181 N.C. 40, 87 S.E. 955, provides: "According to the well accepted definition, lodge means the meeting room of an association, as well as the regularly constituted body of members which meets therein, for the transaction of its business or the conduct of its affairs." *Leacock v. State* (1894), 136 Ind. 217, 36 N.E. 137, held that a lodge is "the meeting room of an association; hence, the regularly constituted body of members which meets there." *Webster's Third New International Dictionary* defines lodge to mean "the meeting place of a branch of a fraternal organization; the body of members composing a branch of a fraternal organization."

It is evident from the above definitions that "meeting or lodge purposes" has reference to the meeting place, including gathering rooms within the structure which are actually used to conduct meetings and transact business of the fraternal organization, and those adjacent rooms and spaces as may be necessary for the convenient normal use of the building. Consequently, the structure, including the dining facilities, is intended to be classified out of the tax base by the applicable statute.

The swimming pool, however, does not appear to be so classified, since it would be difficult to categorize such property as being used exclusively as a meeting place for "meeting or lodge purposes", or for the transaction of lodge business, and it could not be fairly said to fall within the category of adjacent real property reasonably necessary for the convenient use of the lodge building. It should be noted that the opinion of this Office dated 2 March 1971 to the effect that a swimming pool owned by a similar organization was exempt from ad valorem taxation no longer represents the opinion of this Office.

James H. Carson, Jr., Attorney General
Norman L. Sloan
Assistant Attorney General

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5 November 1974

Subject: Health; Student Records; Reporting of Certain Diseases; Construction of Public Law 93-380 and G.S. 130-81

Requested by: Mr. Rodney Hobbs, Chief
Administrative Services Section
Division of Health Services

Question: Does Public Law 93-380 pertain to the reporting of certain diseases by a college or university physician to a local health director pursuant to G.S. 130-81?

Conclusion: Public Law 93-380 does not pertain to such reporting by a college or university physician.

Section 513 of Public Law 93-380 amends the Elementary and Secondary Education Act of 1965 to require that all State and local educational institutions and agencies, receiving federal funds, afford a parent (or alternatively, where applicable, an adult student or student at a post-secondary institution) the opportunity to inspect and review all official records, files, and data and prevent the release of personally identifiable records or files or personal information contained therein, except to specified individuals and agencies, without the written consent of the parent or, where applicable, the student. Section 513 provides that those institutions and agencies which have a policy of denying or which effectively prevent inspection and review of records or which have a policy or practice of releasing records, except as provided in the section, shall not receive federal funds.

G.S. 130-81 provides that every physician who believes a person

about whom he has been consulted professionally has a disease declared to be reportable by the Commission for Health Services shall report the matter to the local health director within 24 hours. If the patient is a minor, the physician shall report the name and address of the parent or guardian.

The question is whether the reporting of a disease pursuant to G.S. 130-81 by a physician who is employed at a college or university infirmary requires the written consent of the student-patient. Section 513 provides that whenever a student is attending an institution of post-secondary education, the consent required of the parent shall only be required of the student.

It is the opinion of this Office that the amendment to the Elementary and Secondary Education Act of 1965, as contained in Section 513 of Public Law 93-380, does not pertain to the reporting of diseases by a college or university physician pursuant to G.S. 130-81. The amendment refers to the release of personally identifiable records. G.S. 130-81 requires the reporting of a disease within 24 hours after the physician has been professionally consulted concerning the person. Although a record of the visit, diagnosis, and treatment may subsequently be made, the reporting by the physician involves knowledge obtained from his examination of the patient and not from school records. Furthermore, the amendment refers to educational institutions and agencies which have a policy or practice of releasing personal records of students without written consent of parent or student. Where a physician reports a disease pursuant to G.S. 130-81, the report is made pursuant to State law, not administrative policy. The purpose and importance of G.S. 130-81 is evident: to enable the local health director, once informed of the existence of certain diseases, to protect the public health from any danger presented. It could not be the intent of the amendment to restrict the import of G.S. 130-81.

Although it is the opinion of this Office that Section 513 of Public Law 93-380 does not affect the responsibilities of a physician pursuant to G.S. 130-81, the application of Section 513, in general, to educational institutions and agencies in this State is clear.

James H. Carson, Jr., Attorney General
Robert R. Reilly
Associate Attorney

7 November 1974

Subject:	Motor Vehicles; Registration Rental Vehicles; U-Haul (G.S. 20-84.2)
Requested by:	Mr. Victor J. Hines, Director Common Carrier Tax Section Department of Motor Vehicles
Question:	To avail itself of full reciprocity under Part 6.1 (Rental Vehicles) of Chapter 20 of the General Statutes of North Carolina, must a vehicle rental company file applications covering every or all rental vehicles by declared weight class or may it file only on one way rental vehicles?
Conclusion:	A declaration must be filed on every or all rental vehicles by declared weight.

G.S. 20-84.2 reads in relevant part:

> "§20-84.2. *Definition; reciprocity; Commissioner's powers.*–(a) The term rental vehicle when used herein shall mean and include any motor vehicle which is rented or leased to another by its owner for a period of not more than 30 days solely for the transportation of the lessee or the private hauling of the lessee's personal property.
>
> (b) Rental vehicles owned or operated by any nonresident person engaged in the business of leasing such vehicles for use in intrastate or interstate commerce shall be extended full reciprocity and exempted from registration fees only in instances where:
>
> (1) . . .
>
> (2) Such person operates vehicles which are a part of a common fleet of vehicles

which are easily identifiable as a part of such fleet and such person has validly licensed in the State of North Carolina a percentage of the total number of vehicles in each weight classification in such fleet which represents the percentage of *total miles travelled in North Carolina by all vehicles in each weight classification* of such fleet to total miles travelled in all jurisdictions in which such fleet is operated *by all vehicles in each weight classification* of such fleet." (Emphasis added)

The statute requires that mileage of *any and all* vehicles be reported for the purpose of determining the number of vehicles that must be registered in North Carolina.

James H. Carson, Jr., Attorney General
William W. Melvin
Assistant Attorney General

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7 November 1974

Subject: State Departments, Institutions, and Agencies; Reorganization; Transfer of the State Ports Authority by a Type II Transfer to the Department of Transportation

Requested by: Mr. H. Y. Kinard
Assistant Secretary for Management
Department of Transportation

Question: As a result of the Executive Organization Act of 1971, which powers of the State Ports Authority enumerated in N.C.G.S. 143-218 were transferred to the Secretary of Transportation?

Conclusion: All those statutory powers of the Ports Authority enumerated in N.C.G.S. 143-218 which can be termed "management functions" have been transferred to the Secretary of Transportation.

Chapter 143A of the General Statutes, the Executive Organization Act of 1971, created, among others, the Department of Transportation, headed by the Secretary of Transportation. N.C.G.S. 143A-97. The North Carolina State Ports Authority was transferred under the Executive Organization Act of 1971 to the Department of Transportation by a Type II transfer. N.C.G.S. 143A-107.

As provided in N.C.G.S. 143A-6(b), a Type II transfer means the transferring intact of an existing agency to a principal department so that the agency transferred "shall be administered under the direction and supervision of that principal department, but shall exercise all its prescribed statutory powers independently of the head of the principal department, except that under a Type II transfer the management functions if(of) any transferred agency, or part thereof, shall be performed under the direction and supervision of the head of the principal department." The term "management functions" is defined in N.C.G.S. 143A-6(c) as meaning "planning, organizing, staffing, directing, coordinating, reporting and budgeting".

The purposes for which the Ports Authority was created are set forth in N.C.G.S. 143-217. In order to enable the Ports Authority to accomplish those purposes, the General Assembly gave to it broad and sweeping powers which are enumerated in N.C.G.S. 143-218. Among those powers therein enumerated are the powers of a body corporate; the power to make contracts; to rent, lease, buy and encumber property, real and personal; to acquire, construct and operate wharves, docks and warehouses; to create and operate such agencies and departments as may be deemed necessary or useful; to apply for and accept loans and grants of money; to act as an agent for the United States; to adopt and alter rules, regulations and bylaws; and to do any and all things that may be necessary to accomplish the purposes for which it was created.

Under a Type II transfer, the transferred agency exercises all of its statutory powers independently of the principal department except that "management functions" are performed under the direction and supervision of the principal department. On its face, this principle seems simple enough. But when applied to the broad and sweeping statutory powers of the Ports Authority enumerated in N.C.G.S. 143-218 to determine which, if any, of these powers are retained by the Ports Authority and which are transferred to the principal department, a serious question is presented. To what extent does the "management functions" exception enter into and divest the Ports Authority of its statutory powers? To give an example, the Ports Authority has specific statutory authority "to make contracts". The power "to make contracts" can only be interpreted as the power to decide what contracts are in the best interest of the Ports Authority, to negotiate the terms of such a contract and to execute that contract. While this is clearly a "statutory power", the decision as to what contracts are necessary and what terms should be included in contracts can equally be termed a "management function" as defined in N.C.G.S. 143A-6(c).

Thus, in regard to the statutory powers of the Ports Authority there appears to be a conflict between the "statutory powers" provision of N.C.G.S. 143A-6(b) and the "management functions" provision of N.C.G.S. 143A-6(c). In the opinion of this Office, the particular exception for "management functions" must be given effect and, to the extent the statutory powers of the Ports Authority can be termed "management functions", such statutory powers are to be performed under the direction and supervision of the Secretary of Transportation. "Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special provision will be taken as intended to constitute an exception to the general provision, since the General Assembly is not to be presumed to have intended a conflict." 7 *N.C. Index 2d*, Statutes, §5.

To summarize, our opinion is that those aspects of the statutory powers of the Ports Authority which can be termed "management functions" are to be performed under the direction and supervision of the Secretary of Transportation. "Management functions"

include, for example, the power to determine what contracts are necessary and the terms of such contracts; the power to determine what property should be acquired or leased and upon what terms; and the power to determine what loans are to be applied for, the terms thereof and the purpose for which the funds are to be expended. The only powers retained by the Ports Authority are those which do not include any "management functions". These include, for example, the power to execute contracts, deeds and leases and the power to apply for loans in its own name.

It is questionable that the General Assembly when including the Ports Authority within the provisions of the Executive Organization Act of 1971 intended such a result, but this result is the only one permitted by the terms of that Act.

James H. Carson, Jr., Attorney General
Edwin M. Speas, Jr.
Assistant Attorney General

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20 November 1974

Subject: State Departments, Institutions and Agencies; North Carolina Milk Commission; Sale of Milk by Retail Stores as "Loss Leader"; Sales Below Cost

Requested by: Mr. Grady Cooper, Jr.
Executive Secretary
North Carolina Milk Commission

Questions: (1) Does the sale of milk by a retailer at below cost as a "loss leader", whether or not the sale is tied to the purchase of other items, constitute a violation of G.S. 106-266.19?

(2) In determining "costs" for the purpose of determining whether the sales price may be "below costs" within the

meaning of G.S. 106-266.19, what items of the retailer's cost of doing business in connection with the sale of milk must be allocated to the per gallon cost of the retailer?

Conclusions:

(1) In order to be within the prohibition of the statute, the finder of facts must find that the offering for sale of milk by a retailer at below cost prices, as a "loss leader", was for the purpose of inducing the public to patronize his store.

(2) Absent detailed additional data, it may only be generally observed that "cost" must be computed as the *actual* cost; that is, the invoice cost less any discounts or rebates taking into account actual handling cost of the retailer in question.

This opinion does not deal with the question of sales of milk below cost for the purpose of injuring, harassing or destroying competition, as that question was considered and decided in the case of *Milk Commission v. Food Stores*, 270 N.C. 323.

After the decision in *Food Stores*, the General Assembly rewrote the Milk Commission Law, Chapter 779, Session Laws of 1971, and what was formerly G.S. 106-266.21 is now codified as G.S. 106-266.19, and the first sentence thereof was amended by inserting "; and the offering for sale of milk by a retailer at below cost prices to induce the public to patronize his store, or what is commonly known in the trade as using milk as a 'loss leader' is also hereby prohibited."

The General Assembly made a legislative finding and determination in Chapter 779, Session Laws of 1971, that the use of milk as a "loss leader" to lure the public into stores was unfair and ruinous competition and would tend to eliminate the number of milk distributors and milk producers, and lead to monopoly of the milk industry.

With this background, and rewrite of the statute, G.S. 106-266.19 now contains two prohibitions. (1) The sale of milk by any distributor, producer-distributor or retailer at below cost prices for the purpose of injuring, harassing or destroying competition. (2) The offering for sale of milk by a retailer at below cost prices to induce the public to patronize his store, or what is commonly known as using milk as a "loss leader".

The North Carolina Supreme Court has not construed the provision of G.S. 106-266.19, dealing with the use of milk as a "loss leader" to induce the public to patronize a retail store.

The Court, in the *Food Store* case, recognized that the Legislature of North Carolina had not, at that time, seen fit to adopt as the policy of the State the prohibition of the sale of any merchandise below cost as a "loss leader" to attract customers to the store of the seller.

The Court also recognized that:

> "Many states have enacted statutes forbidding, as unfair competition, the sale of any merchandise at less than cost with the intent thereby to induce the purchase of other merchandise or to divert trade from a competitor. The Supreme Court of the United States has sustained such legislation. *Safeway Stores v. Oklahoma Grocers*, 360 U.S. 334, 79 S.Ct. 1196; 3 L.Ed. 2d 1280. See also: *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109; *Wholesale Tobacco Dealers B. v. National Candy & T. Co.*, 11 Cal. 2d 634, 82 P. 2d 3; Anno., 118 A.L.R. 506. In the *Safeway Stores* case, Mr. Justice Frankfurter, speaking for the Court, said:
>
> > 'One of the chief aims of state laws prohibiting sales below cost was to put an end to "loss-leader" selling. The selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what

generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains.'" (at 334)

The facts upon which question (1) is predicated are as follows:

> A retail food outlet has advertised milk at a price below cost provided the customer purchases at the same time a minimum order of other items. If the customer does not purchase the minimum amount of other items, then if he purchased milk, he would pay the regular price.

Whether this activity is prohibited by G.S. 106-266.19 is a question of fact which this Office cannot determine. However, if the use of milk as a "loss leader" by selling it below cost by a retailer is to induce the public to patronize his store, then the establishment of these facts would constitute a violation of the statute.

With regard to question (2), insufficient data has been submitted to fully answer this question although it is noted that the "cost" would not be determinative but must be reduced by the proportionate rebate and other applicable discounts, if any, given to the retailer by the processor.

James H. Carson, Jr., Attorney General
James F. Bullock
Assistant Attorney General

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25 November 1974

Subject: Social Services; Authority to Contract for Medicaid Services Payments by a Fiscal Agent; G. S. 108-60

Requested by: Mr. David T. Flaherty
Secretary
Department of Human Resources

Question: May the North Carolina Department of Human Resources, under G.S. 108-60, contract for Medicaid services payments by a fiscal agent?

Conclusion: The North Carolina Department of Human Resources, under G.S. 108-60, may not contract for Medicaid services payments by a fiscal agent.

G.S. 108-60 provides, *inter alia*:

> "Payments from the fund (State Fund for Medical Assistance) shall be made *only* to intermediate care facilities, hospitals and nursing homes licensed and approved under the laws of the State of North Carolina or under the laws of another state, or to pharmacies, physicians, dentists, optometrists or *other providers of services* authorized by the Social Services Commission." (Emphasis supplied)

The Department of Human Resources, in exploring alternate methods of administering the Medical Assistance Program in the State of North Carolina, has requested of the Department of Justice an opinion as to whether State law allows the Department to contract for Medicaid services payments by a fiscal agent based on a premium payment to that fiscal agent for all eligible recipients. In short, may the responsibility for making medical services payments to providers of health-related services be delegated by contract to a fiscal intermediary?

G.S. 108-60 is most explicit and restrictive in detailing who shall be the recipients of medical services payments from the State Fund for Medical Assistance. It is clear that a fiscal agent under the proposed arrangement could *only* become a recipient of such funds if it qualified as another "provider of services authorized by the Social Services Commission."

"Other providers of services" is nowhere defined in Chapter 108 of the General Statutes pertaining to Social Services. The legislative history of the Medical Assistance Program in North Carolina sheds

little light on what specifically the legislators intended by "other providers of services." Accordingly, it appears that this is an appropriate instance for the application of the legal doctrine of *ejusdem generis* which "requires that general words of a statute which follow a designation of particular subjects or things be restricted by the particular designations to things of the same kind, character, and nature as those specifically enumerated." Strong, 7 N. C. Index 2d, Statutes, Sec. 5, p 73. Thus, it is our opinion that the phrase "other providers of services" refers to other providers of health-related services, and not to fiscal intermediaries only indirectly, if at all, associated with the provision of medical services.

James H. Carson, Jr., Attorney General
William Woodward Webb
Assistant Attorney General

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25 November 1974

Subject:	Social Services; Medical Assistance Program; Propriety of Assigning Title XIX (Medicaid) Provider Numbers to Part-Time Dental Consultants with the Medical Services Section of the Division of Social Services
Requested by:	Dr. Renee P. Hill Director Division of Social Services Department of Human Resources
Question:	May two part-time dental consultants to the Medical Services Section of the North Carolina Division of Social Services be assigned provider numbers for purposes of participating in the Title XIX Program (Medicaid) as providers of dental care?
Conclusion:	The two part-time dental consultants to the Medical Services Section of the North

Carolina Division of Social Services may not be assigned provider numbers for purposes of participating in the Title XIX Program (Medicaid) as providers of dental care.

The two part–time dental consultants to the Medical Services Section of the North Carolina Division of Social Services presently share in the responsibility for making decisions relating to prior approvals of dentures, requests for inpatient admission for dental extractions, and payment of individual claims which do not fall within the "norms." Both consultants have now applied for provider numbers for purposes of participating in the Title XIX Program (Medicaid) as providers of dental care. Since neither consultant is terminating his part–time employment with the Medical Services Section, it is contemplated that any review of one of the consultant's provider activities would be conducted by the other consultant. Finally, we are advised that the work periods of the two dental consultants do not overlap.

It is our opinion that such an arrangement does not fall within the bounds of propriety. To reiterate a possibly overused but nevertheless appropriate legal maxim, for people in positions of public trust it is imperative not only to avoid any impropriety but also the appearance of any impropriety. While not in any way predisposed to assume any illegal or unethical conduct on the part of the consultants were they approved as providers, we simply cannot ignore that the absolute and requisite freedom to render completely disinterested decisions would be subject to justifiable doubt under such a situation. The fact that each consultant would review the other's provider activities leads to the inescapable conclusion that decisions in this regard may not be entirely independent of bias, however subconscious. Accordingly, it would be improper, in our judgment, to approve these two part–time dental consultants as Title XIX providers of dental care.

James H. Carson, Jr., Attorney General
William Woodward Webb
Assistant Attorney General

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27 November 1974

Subject: State Departments, Institutions and Agencies; Purchase and Contract Division; Boards of Education; Community Colleges; Public Contracts; Purchase of Supplies, Material and Equipment; Printing

Requested by: Mr. Herbert O. Carter
State Purchasing Officer

Questions: (1) Are local boards of education and community colleges required to purchase equipment, materials and supplies in accordance with contracts made by or with approval of the Department of Administration when the purchases will be paid for from local funds?

(2) Do the requirements of G.S. 115-52 and G.S. 115A-31, which require local boards of education and community colleges to purchase materials, supplies and equipment through the Department of Administration, apply to the purchase of printing?

Conclusions: (1) Yes. The provisions of G.S. 115-52 applicable to local boards of education and G.S. 115A-31 applicable to the community colleges, which require the purchase of *all* supplies, materials and equipment in accordance with contracts made by or with the approval of the Department of Administration, are all inclusive and the provisions are applicable to all such purchases made from local funds as well as those purchases made with State funds.

(2) No. The contracting for printing is

not included within the provisions of G.S. 115A-31 and G.S. 115-52 which are applicable to the purchase of supplies, materials and equipment.

G.S. 115-52 provides as follows:

> "*It shall be the duty of county and city boards of education to purchase or exchange all supplies, equipment and materials in accordance with contracts made by or with the approval of the Department of Administration.* Title to instructional supplies, office supplies, fuel and janitorial supplies, enumerated in the current expense fund budget and purchased out of State funds, shall be taken in the name of the county or city board of education which shall be responsible for the custody and replacement: Provided, that no contracts shall be made by any county or city administrative unit for purchases unless provision has been made in the budget of such unit to provide payment therefor, or unless surplus funds are on hand to pay for same, and in order to protect the State purchase contracts, it is hereby made the mandatory duty upon the part of the governing authorities of such local units to pay for such purchases promptly in accordance with the terms of the contract of purchase." (Emphasis added)

G.S. 115A-31 provides as follows with reference to trustees of community colleges, technical institutes, and industrial centers:

> "*It shall be the duty of the several boards of trustees to purchase all supplies, equipment and materials in accordance with contracts made by or with approval of the North Carolina Department of Administration.* No contract shall be made by any board of trustees for purchases unless provision has been made in the budget of the institution to provide payment therefor, and in order to protect the State purchase contracts, it is the mandatory duty of the board of trustees and administrative officers of each institution to pay for

such purchases promptly in accordance with the contract of purchase." (Emphasis added)

The first sentences of both G.S. 115A-31 and G.S. 115-52 are almost identical with the exception that an amendment in 1965 inserted the words "or exchange" to G.S. 115-52. The amendment did not change any of the existing requirements but only added the "exchange" of supplies, material and equipment to the requirements of G.S. 115-52.

The statutes require the board of education and community colleges to purchase "all supplies, equipment and materials in accordance with (the) contracts made by or with (the) approval" of the Department of Administration. The statutes are all inclusive and contain no exceptions. It appears that the intent of the Legislature was to require the purchase of all supplies, materials, and equipment through the Department of Administration regardless of the source of funds. Therefore, it is the opinion of this Office that the provisions of the quoted statutes are applicable to the purchase of all supplies, material and equipment by local boards of education and community colleges made from local funds as well as those purchases made from State funds. This opinion is in accordance with earlier opinions of this Office to C. M. Williams dated September 24, 1949, and to David Key Holton dated November 16, 1956.

The second inquiry relates to the application of the provisions of G.S. 115-52 and G.S. 115A-35 to printing. It is the opinion of this Office that printing is not considered supplies, equipment or materials and that the purchase of printing does not come within the requirements of the provisions of G.S. 115-52 or G.S. 115A-35. Printing is defined by *Black's Law Dictionary*, 4th Edition, as follows:

> "The impress of letters or characters upon paper, or upon other substance; implying a mechanical act."

It thus appears that printing is not included in the definition of either supplies, materials, or equipment.

State purchasing is made by the Purchase and Contract Division in

accordance with Article 3 of Chapter 143. G.S. 143-49(1) provides for the purchase of "supplies, material and equipment". G.S. 143-49(5) makes it the duty of the Department of Administration "to make provision for or to contract for all State printing, including all printing, binding, paper stock and supplies or materials in connection with the same." The provisions of G.S. 143-168 and G.S. 143-169 regulate State printing and publication. The statutory provisions for the purchase of supplies and equipment by the Purchase and Contract Division are separate from those for the purchase and regulation of printing needs of the State. It would therefore appear that there is no legislative intent to include printing as supplies, materials and equipment. It also appears as a practical matter that printing for local educational units and community colleges is not included in a State contract. It is frequently necessary for the educational unit requiring the printing to work closely with the printer.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Assistant Attorney General

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27 November 1974

Subject: Criminal Law and Procedure; Law Enforcement; Juveniles; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq.

Requested by: Mr. Charles Dunn, Director
State Bureau of Investigation

Question: May agents of the S.B.I. lawfully take fingerprints of a "child" accused of a misdemeanor when the "child" is subject to the jurisdiction of the juvenile court by virtue of being less than 16 years of age?

Conclusion: No. S.B.I. agents may not lawfully take fingerprints of a juvenile who is subject to the jurisdiction of the juvenile court by

> virtue of being less than 16 years of age unless the child is at least 14 years of age, is charged with a felony and has been transferred to the Superior Court in accordance with the provisions of G.S. 7A-280 or unless the child is at least 14 years of age, has been charged with a capital felony and has been transferred to the Superior Court in accordance with the provisions of G.S. 7A-280.

Other opinions of the Attorney General which bear on this general area are 40 N.C.A.G. 173; 40 N.C.A.G. 670; and the recent opinion to Mr. James P. Smith of the Department of Correction dated 15 October 1974.

The appropriate statute, G.S. 114-19, which relates to the taking of fingerprints and photographs of suspects and convicts has been held to "neither authorize nor prohibit the fingerprinting and photographing of misdemeanant defendants", *State v. Accor*, 277 N.C. 65, 78 (1970). The Court in *Accor* expressly approved the holdings in *Chapman v. State*, 4 N.C. App. 438 (1969), and *State v. Strickland*, 5 N.C.App. 338 (1969), that the statute "did not create an exclusionary rule of evidence."

The factor determinative of the issue then is not one of whether evidence is admissible at a criminal trial but is the public policy of the State with regard to "children" as defined by G.S. 7A-278 and the public policy with regard to disposition of misdemeanor charges against them. The public policy of the State of North Carolina with regard to juveniles and disposition of allegations of misconduct against them is spelled out in G.S. 7A-277 in which the purpose of Article 23 of Chapter 7A is stated "to provide procedures and resources for children under the age of 16 years which are *different in purpose and philosophy from the procedures applicable to criminal cases involving adults.*" (Emphasis added) A child is any person who has not reached his 16th birthday (G.S. 7A-278(1)). A "delinquent child" includes "any child who has committed any criminal offense under State law or under an ordinance of local government including violations of the motor vehicles laws...." (G.S. 7A-278)

The jurisdiction of the district court with regard to juveniles is spelled out in G.S. 7A-279. The court has "exclusive original jurisdiction over any case involving a child who resides in or is found in the district and who is alleged to be delinquent... except as otherwise provided."

The "otherwise provided" language of G.S. 7A-279 obviously refers to the provisions of G.S. 7A-280 which discusses jurisdiction in certain felony cases. Where an accusation or an allegation of misconduct is made against a child who has reached his 14th birthday and the accusation is of an offense which would be a felony, the judge must conduct a probable cause hearing. If he finds probable cause, he may, nevertheless, hear the case under the procedure of Article 23 of Chapter 7A or he may, if he "finds that the needs of the child for the best interest of the State will be served", transfer the case to the Superior Court Division for trial as in the case of adults. Where the alleged felony is a capital offense and the district judge finds probable cause, he must transfer the case for trial in the Superior Court Division as in the case of adults. In all other cases and until there is an order transferring the matter, the matter remains within the jurisdiction of the district court judge sitting as a juvenile court.

The statute further authorizes the maintenance under very carefully safeguarded conditions of "juvenile records". The statute further spells out that "an adjudication that a child is delinquent...shall not disqualify him for public office nor be considered as a conviction of any criminal offense." G.S. 7A-287.

In view of the strong public policy favoring protection of juveniles which is qualified only in the case where a juvenile is accused of a serious crime, i.e., a felony or capital felony, and the fact that a determination that a child is delinquent is not the equivalent of a conviction of a criminal offense, it appears that the provisions of G.S. 114-19 do not apply to "children" as defined in G.S. 7A-278(1) who are within the jurisdiction of the juvenile court unless they have been charged with a felony and transferred to the Superior Court Division for trial as in the case of adults. Accordingly, agents of the S.B.I. may neither photograph nor fingerprint children accused of misdemeanors.

After July 1, 1975, the appropriate statutory references will include G.S. 15A-502(c).

Rufus L. Edmisten, Attorney General
Sidney S. Eagles, Jr.
Assistant Attorney General

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27 November 1974

Subject: Health; Sanitation of Food and Lodging Establishments; Definition of "Private Clubs" and "Occasional"; G.S. 72-49

Requested by: Mr. John Andrews, Head
Sanitation Branch
Sanitary Engineering Section
Division of Health Services

Question: What is the definition of "private clubs" and "occasional" in G.S. 72-49?

Conclusion: The term "private clubs" refers to establishments which maintain selective membership, are operated by the membership, and are not profit orientated; the term "occasional" means occurring at irregular intervals, infrequent, occurring now and then, incidental.

Article 5 of Chapter 72 of the General Statutes authorizes the Commission for Health Services to adopt rules and regulations governing the sanitation of any hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich-manufacturing establishment, and all other establishments where food or drink is prepared, handled, and served for pay, or where lodging accommodations are provided. The purpose of these rules and regulations is to protect the public health.

G.S. 72-49 provides certain exceptions to the applicability of Article 5. The exceptions pertain, *inter alia*, to private homes providing food

and/or lodging to permanent house guests, private clubs, picnics, camp meetings, reunions, and occasional fund-raising suppers and similar gatherings conducted from time to time by church, civic or charitable organizations. These exceptions pertain to either the service of a limited number of people or the service of a large number of people on a single occasion. It is in this context that the terms "private clubs" and "occasional" derive their meaning.

It should be noted that selective membership in the definition of "private clubs" refers to determination of membership upon mutual interests not common to the general public and upon standards therefor adopted by the membership. Payment of an admission fee, denominated as a membership fee, for entrance into an establishment would not constitute selective membership.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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27 November 1974

Subject: Social Services; Social Services Commission; Standards for Selection of County Social Services Board Members

Requested by: Dr. Renee P. Hill
Director
Division of Social Services
Department of Human Resources

Questions: (1) May a public assistance recipient serve as a member of the social services board of the county from which he receives financial assistance?

(2) May an employee of a county department of social services serve as a member of that county's social services board?

Conclusions:

(1) A public assistance recipient may not serve as a member of the social services board of the county from which he receives financial assistance.

(2) An employee of a county department of social services may not serve as a member of that county's social services board.

With respect to the second question stated above, there is no question but that it would be a conflict of interest for an employee of a county department of social services to serve as a member of that county's social services board. Under G.S. 108-19(2), the director of the county department of social services appoints the "necessary personnel of the county department of social services in accordance with the merit system rules of the State Personnel Board." At the same time, under G.S. 108-15 and G.S. 108-18, the county board of social services has the responsibility of selecting and setting the salary of the county director of social services. Moreover, under G.S. 108-17 the county director is subject to dismissal by the board of social services. Thus, an employee of the county department of social services who serves on that county's board of social services would be placed in the untenable position of supervising his supervisor, a situation obviously constituting a conflict of interest.

With reference to the first question posited above, there is no statutory prohibition against a public assistance recipient serving as a member of the board of social services of the county from which he receives financial assistance. Nevertheless, the North Carolina Social Services Commission has promulgated certain standards for the selection of county social services board members. It is our opinion that the Social Services Commission has the authority pursuant to G.S. 143B-153 to promulgate such standards. Standard No. 5 states:

> "Board members shall not have any near relatives receiving financial assistance through the county department of social services on which board they serve. ('Near relatives are defined as father, mother,

brother, sister, husband or wife, son, daughter, half-brother and half-sister.')"

It is patent that an AFDC recipient would fall within the purview of this Standard since a near relative, i.e., a dependent child, would also necessarily be receiving financial assistance. Yet, in any event, it is implicit that if a board member may not have any near relatives receiving financial assistance through the county department of social services on which board he serves, then he himself may obviously not be a recipient of financial assistance through that county department. It is the position of this Office that this Standard is rationally related to a valid State objective, namely, the avoidance of a potential conflict of interest situation. See, for example, G.S. 108-43 providing, in pertinent part, that the county director of social services is to submit any modification of a recipient's grant to the county board of social services for approval. Accordingly, it is our conclusion that a public assistance recipient may not serve as a member of the social services board of the county from which he receives financial assistance.

This opinion is not to be construed, however, as precluding the utilization of advisory committees composed of welfare recipients and others whose personal knowledge of the problems considered by social services boards may prove to be of invaluable assistance.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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3 December 1974

Subject: Mental Health; Area Mental Health Programs; Single County Program as a Public Authority

Requested by: Mr. Harlan E. Boyles
Secretary
Local Government Commission
N. C. Department of the Treasurer

Question: Is an area mental health program consisting of only one county a "public authority" or an administrative department of the county for purpose of implementing G.S. 159-7?

Conclusion: A single county mental health program should be considered as a "public authority" for the purpose of implementing G.S. 159-7.

As pertinent to this opinion, G.S. 159-7(b) (10) defines the term "public authority" as "...a local governmental authority, board, commission, council or agency that...operates on an area, regional, or multi-unit basis, and the budgeting and accounting systems of which are not fully a part of the budgeting and accounting systems of a unit of local government."

Article 2C of Chapter 122 of the General Statutes authorizes the creation of area mental health programs and G.S. 122-35.20 provides that each of these programs will be operated by an area mental health board. Both multi-county and single county programs are authorized. However, it is apparently universally conceded that multi-county programs fall within the term "public authority", so that the question posed relates only to single county area programs.

This Office has previously had occasion to examine the nature of area mental health programs. Previous opinions on that subject have contained the conclusions that an area mental health program is a separate legal entity which is under the authority and control of the area mental health board rather than under the direct control of the county board of commissioners. See opinion of the Attorney General to Mr. R. J. Bickel, dated 3 September 1974, 44 N.C.A.G. 67 (1974); also see 41 N.C.A.G. 778 (1972) and 42 N.C.A.G. 120 (1972). As a result of the same rationale utilized in these prior opinions, it must be concluded that a single county area mental health program is a "public authority" as contemplated by G.S. 159-7.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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3 December 1974

Subject: Courts; Infants and Incompetents; Concurrent Jurisdiction Over Juveniles on Probation

Requested by: Mr. John R. Brady
Supervisory Counselor
General Court of Justice
6th Judicial District

Question: When a youth under the juvenile jurisdiction of the courts is placed on juvenile probation in District A but is then transferred to District B, does the district court judge in District B have concurrent jurisdiction in the case?

Conclusion: Under the circumstances described, the district court judges in District A and in District B have concurrent jurisdiction in the case.

G.S. 7A-279 provides as follows:

> "§7A-279. *Juvenile jurisdiction.*–The court shall have exclusive, original jurisdiction over any case involving a child *who resides in or is found in the district* and who is alleged to be delinquent, undisciplined, dependent or neglected, or who comes within the provisions of the Interstate Compact on Juveniles, except as otherwise provided. This jurisdiction shall be exercised solely by the district judge." (Emphasis supplied)

On the other hand, G.S. 7A-286 contains the following pertinent language:

> "In any case where the court adjudicates the child to be delinquent, undisciplined, dependent or neglected, the jurisdiction of the court to modify any order of disposition made in the case shall continue during the minority of the child or until terminated by order of the court, except as otherwise provided herein, provided that any child subject to the juvenile jurisdiction of the court shall be subject to prosecution in any court for any offense committed after his sixteenth birthday."

The first quoted statute clearly vests jurisdiction in the appropriate court based upon the geographic location of the juvenile concerned. The second statute plainly provides that the initial court which exercises jurisdiction over a case retains such jurisdiction for purpose of any modification action necessary. Giving full credence to both provisions necessitates recognition of the existence of concurrent jurisdiction by the district courts in both District A and District B.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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13 December 1974

Subject: Motor Vehicles; Motor Vehicle Dealers; Use of Dealer Plates

Requested by: Mr. Frank J. Yeager, District Attorney
Twenty-First Judicial District

Question: Where a motor vehicle dealer needs body work or other outside work performed on an inventory vehicle, may the vehicle be operated by an employee or agent of a non-dealer-owned or operated repair

facility to the place where work is to be performed off the dealer's premises and returned while displaying dealer plates?

Conclusion: No.

G.S. 20-79 provides for the use of vehicles bearing dealer plates by the dealer or his employees while in the furtherance of the dealer's business and the use by persons other than employees of the dealer if such person has in his possession a 96-hour permit as provided in subsection (b). The employee of the non-dealer-owned repair facility not falling within the category of one permitted to operate a vehicle displaying dealer plates would be guilty of improper use of dealer plates.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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13 December 1974

Subject: Mental Health; Involuntary Commitment; Release of Patient Charged with Crime

Requested by: Honorable Claude W. Allen, Jr.
District Court Judge

Question: When an indictment is pending against a patient sent to a State mental health facility pursuant to the provisions of Article 11 of Chapter 122 of the General Statutes, may such patient upon recovery be released unconditionally from the mental facility?

Conclusion: No. Where an indictment is pending against a patient sent to a mental health facility pursuant to Article 11 of Chapter 122 of the General Statutes, he should upon

recovery be released to the sheriff of the county from which he was committed, unless bail has been fixed and met pursuant to G.S. 122-87.

G.S. 122-87 provides that when a person confined in a facility for the mentally ill and against whom an indictment for crime is pending has recovered, the administrator of such facility shall notify the clerk of court of the county from which such person was sent; it also provides for the fixing of bail. If such person shall give the required bond, he may be discharged by the administrator; and, if not, he is to be transferred to the jail of the county from which he was committed. This statute further makes provision for the sheriff of the county from which the patient was committed to be notified and places a duty upon the sheriff to remove such person to the jail of his county.

We are of the opinion that this statute is controlling and that where an indictment is pending against a patient he should not be released outright upon recovering his sanity but should be released to the sheriff of the county from which he was committed unless bail has been fixed and met as provided by G.S. 122-87.

It is noted that G.S. 122-87 was repealed by Section 26, Chapter 1286, of the 1973 Session Laws effective July 1, 1975. Thereafter, the provisions of Article 56, Chapter 15A, effective July 1, 1975, would appear to provide a procedure for the release from a mental institution of such patients. Thus the procedures herein specified may be subject to a different interpretation after July 1, 1975.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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13 December 1974

Subject: Mental Health; Local Mental Health Clinics; Authority to Issue a Certificate of Incompetence Under G.S. 35-3

Requested by: Honorable James C. Woodard
Clerk of Superior Court
Johnston County

Question: Does the clinical director of a local mental health clinic operated under Article 2A, Chapter 122, have the authority to issue a certificate of incompetence for an adult patient pursuant to G.S. 35-3?

Conclusion: The clinical director of a local mental health clinic operated under the provisions of Article 2A, Chapter 122, has the authority to issue a certificate of incompetence pursuant to G.S. 35-3 upon an adult receiving in-patient treatment at such clinic.

G.S. 35-3, as pertinent to this question, provides that:

> "If any person is confined in any State, territorial or governmental asylum or hospital for the insane in this State or State training school or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital or training school declaring such person to be of insane mind and memory or mentally retarded, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary public, or the clerk of any court of record in the county, in which such hospital or training school is situated and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person...."

Throughout the years the concept for administering in-patient therapy to the mentally ill has changed so as to emphasize treatment at locally operated, smaller medical facilities rather than at a few large, totally State-owned hospitals. Thus, Article 2C of Chapter 122 provides for the establishment of area mental health programs, while

Article 2A of the same Chapter authorizes local mental health clinics. These latter clinics may be established by counties, municipalities or community agencies. See G.S. 122-35.5. They are considered to be joint undertakings by the N.C. Department of Human Resources and the local mental health authority for the area concerned. See G.S. 122-35.6. The rules and standards for the local clinics are established by the N.C. Commission of Mental Health Services, and the Department of Human Resources supervises the clinics' operation and administers the standards required. G.S. 122-35.1, G.S. 122-35.3, and G.S. 122-35.6. Subject to Departmental approval, the appropriate local mental health authority appoints a medical doctor having suitable psychiatric expertise as clinical director for each clinic. G.S. 122-35.7 and G.S. 122-35.8.

In keeping with the modern thinking on the most desirable approach to psychiatric therapy, the Legislature has provided for involuntary commitment to local treatment facilities and has included patients therein among those whose civil rights are statutorily protected. See G.S. 122-36(g), G.S. 122-58.6, and G.S. 122-58.8(b).

In assessing the legislative intent behind the forerunner of the present G.S. 35-3, our Supreme Court opined:

> "It was evidently intended by the General Assembly that the certificate of insanity should be received and accepted as evidence only when made by the superintendent of a hospital which is subject to state, territorial, or governmental control, and not when made by the manager or superintendent of a private institution, who occupies no public official position and is not directly subject to governmental supervision." *Groves v. Ware*, 182 N.C. 553, 557 (1921).

The local mental health clinic described in the present question would appear to fall within the type of institution subject to governmental supervision as contemplated by G.S. 35-3. Significantly the General Assembly in speaking to the subject of patients' rights while in a "treatment facility"–with such term including local mental health clinics–provided that a patient may be deprived of his civil rights to conduct his own affairs only by

being adjudicated incompetent under the provisions of Chapter 35 of the General Statutes. This provision is contained in G.S. 122-55.2(c), which makes no distinction between determinations made under the provisions of G.S. 35-3 and other statutes contained in Chapter 35.

Obviously, the clinical director, who is responsible for the administration of the clinic, equates to the "superintendent" contemplated by G.S. 35-3. Of course, the terminology "confined in" as used in G.S. 35-3 must be construed to limit the issuance of such a certificate to inpatients of a local mental health clinic and would not authorize such certificates for outpatients of these clinics.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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13 December 1974

Subject: Health; Public Records; Reports of Medical Examiners; Autopsy Reports

Requested by: Mr. Rodney C. Hobbs, Chief
Administrative Services
Division of Health Services

Question: Are reports of medical examiners and autopsy reports public records?

Conclusion: Reports of medical examiners and autopsy reports, except upon exhumed body or remains, are public records.

G.S. 132-1 defines public records as "all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business." G.S. 132-6 provides that "Every

person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law."

Absent an expression of contrary legislative intent, it would appear that reports of medical examiners and autopsy reports would fall within the broad definition of "public records".

G.S. 130-198 describes the circumstances under which a medical examiner shall be notified of a death. G.S. 130-199 provides that the medical examiner shall take charge of the dead body, make inquiries, and file a report with the Secretary of Human Resources. G.S. 130-199 further provides that copies of the report shall be delivered to the district attorney and, upon request, to a defendant in a criminal action or to any party in a civil action. This provision is not construed by this Office as limiting the persons who may obtain copies of the medical examiner's report but rather as specifying some of those persons who shall or may receive a copy.

G.S. 130-200 provides the circumstances under which an autopsy is to be performed. Again, the statute provides who is to receive copies of the autopsy report. This also is not construed as limiting those who may obtain a copy. Neither G.S. 130-199 nor the first paragraph of G.S. 130-200 expresses a legislative intent to except the reports from the broad applicability of Chapter 132 of the General Statutes.

However, the second paragraph of G.S. 130-200, which pertains to the exhumation of a body or the remains thereof for the purpose of an autopsy or examination under certain circumstances, does contain such an intent to limit the availability of the report made from the examination or autopsy. The paragraph provides that where a death occurs under circumstances as described in G.S. 130-198 and the body is buried without examination pursuant to G.S. 130-199 or the body is cremated without complying with the Article, the medical examiner shall notify the district attorney who shall request a judge to order the exhumation, examination and autopsy. The pertinent facts disclosed shall be given to the district attorney and the judge and "a copy of said report shall be furnished to any other interested person upon order of a court of record after

need therefor has been shown." It is apparent that the Legislature has established judicial control over the exhumation and autopsy of a body once it has been buried and the examination of the remains of one cremated and has restricted the access to the report of such autopsy and examination. It is therefore the opinion of this Office that such reports are not "public records" as defined in G.S. 132-1 and are subject to inspection only as provided in G.S. 130-200.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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13 December 1974

Subject: Mental Health; Involuntary Commitment Proceedings; Vaginal Examination as Part of Pre-hearing Examination and Post-hearing Treatment

Requested by: Mr. Sam Jenkins, Jr.
Special Counsel
Cherry Hospital

Question: May a female patient be given a vaginal examination by a qualified physician at a North Carolina mental health facility over her objection:

(a) during the pre-hearing examination required by G.S. 122-58.6?

(b) during post-hearing treatment after commitment?

(c) in either of these situations when restraint or medication is necessary in order to conduct such vaginal examination?

Conclusion: A female patient may be given a vaginal examination by a qualified physician at a North Carolina mental health facility over her objection if the vaginal examination is deemed to be medically necessary in the opinion of the responsible qualified physician:

(a) during the pre-hearing examination required by G.S. 122-58.6;

(b) during post-hearing treatment after commitment;

(c) in both of the situations described in (a) and (b), even when restraint or medication is necessary in order to conduct the vaginal examination, so long as the provisions of G.S. 122-55.3 and G.S. 122-55.6, as applicable, are followed.

G.S. 122-58.6 deals with pre-hearing detention and treatment of a respondent in an involuntary commitment proceeding. This statute requires examination of the respondent by a qualified physician and a report thereon to the court. Additionally, the qualified attending physician "...is authorized to administer to the respondent reasonable and appropriate medication and treatment that is consistent with accepted medical standards." As part of the basic human rights guaranteed to all patients in North Carolina treatment facilities, G.S. 122-55.5 guarantees each patient "...the right to treatment including medical care and habilitation." This same right, in slightly different phraseology--i.e., "...the right to receive appropriate treatment for mental and physical ailments and for the prevention of illness or disability"--is reiterated in G.S. 122-55.6. This latter statute also spells out the bounds on the permissible use of medication. Looking to the language of that statute, it is clear that the use contemplated here, despite objection by the respondent, is not proscribed so long as the medication is administered on a

"written order of a qualified physician", is not "unnecessary or excessive", and does not involve "experimental drugs."

The only statute dealing with restraint of a respondent in North Carolina mental health facilities is G.S. 122-55.3. There, employment of physical restraints in dealing with a patient is authorized "when necessary to prevent danger of abuse to himself or others, or a measure of therapeutic treatment." Of course, an absolute requirement for the use of the restraint is a recordation thereof.

Overall, it appears that the legislative mandate that respondents placed in mental health facilities be given appropriate examination and treatment must prevail over any objections of a female respondent to a vaginal examination when the qualified physician has determined that this part of the examination is necessary in order for him to fulfill his statutory responsibilities in an involuntary commitment situation.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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16 December 1974

Subject: Mental Health; Area Mental Health Programs; Removal of Area Mental Health Board Members; Terms of Area Mental Health Board Officers

Requested by: Mr. Charles R. Franklin, Jr.
Area Program Director
Albemarle Mental Health Center

Questions: (1) Does an area mental health board have the authority to remove an individual board member from the board before the respective individual board member's appointment expires?

(2) Does an area mental health board have the authority to remove an individual board member from an officer's position on the board (e.g., Chairman, Vice Chairman, Secretary or Treasurer) before the individual board member's term as an officer expires?

Conclusions:

(1) The following rules govern the authority of an area mental health board to remove an individual board member:

(a) Board members appointed by county commissioners and public officials (including commissioners serving in an ex officio capacity to their public offices) may not be removed by the board before their terms of appointment expire.

(b) Other members of the board appointed for terms of years may be removed by the board for cause before their terms of appointment expire.

(2) Removal of an individual board member from an officer's position on the board prior to expiration of his term as an officer is an internal decision to be made by the particular area mental health board.

The only statutory guidance regarding the term of office of members of area mental health boards is found in G.S. 122-35.20 (b) and (c), as follows:

"(b) In areas consisting of only one county with a population of 325,000 or more, the board of county commissioners may serve as the area mental health board, or they shall appoint all the members of the area mental health board. In areas consisting of more

than one county and in areas consisting of only one county where the population is less than 325,000, each board of county commissioners within the area shall appoint one commissioner as a member of the area mental health board. These members shall appoint the other members of the area mental health board in such a manner as to provide equitable area-wide representation.

(c) The area mental health board, if appointed, shall include:

(1) At least one commissioner from each county;

(2) At least two persons duly licensed to practice medicine in North Carolina;

(3) At least one representative from the professional fields of psychology, or social work, or nursing, or religion;

(4) At least three representatives from local citizen organizations active in mental health, or in mental retardation, or in alcoholism or in drug dependence;

(5) At least one representative from local hospitals or area planning organizations;

(6) At least one attorney practicing in North Carolina."

As can be readily noted, the statute is silent as to the termination of an appointment as a board member other than by expiration of his term of office. Of course, it is a generally accepted principle of law that, where a governing statute specifies a term of office, the occupant cannot be prematurely removed from office solely at the pleasure of the appointing authority. See *Kinsland v. Mackey*, 217 N.C. 508 (1940). However, it is an equally well accepted principle of law that the power to appoint includes the power to remove

for cause notwithstanding the fact that tenure is fixed by statute. See *State ex rel Rockwell v. State Board of Education*, 213 Minn. 184, 6 N. W. 2d 251 (1942); *State ex rel Nagle v. Sullivan*, 98 Mont. 425, 40 P. 2d 995 (1935). As a result, the Board may prematurely terminate for cause the appointment of members when such appointment has been made by the board, but has no authority to prematurely terminate other appointments by virtue of the provisions of G.S. 122-35.20(b). The authority to prematurely terminate appointments shall be exercised only by the county commissioner members of the board.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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INDEX TO ATTORNEY GENERAL OPINIONS

Volume 44, Pamphlet 1

A

AD VALOREM TAXES (See Taxation; Ad Valorem)

ADMINISTRATION OF ESTATES
Guardian; Mental Patients; Appointment of Out-of-State Resident as Guardian 152

ALCOHOLISM RESEARCH AUTHORITY
Appropriations; Expenditures; Agreements; Overhead Expenses of Research Facilities; Payment by Authority 106

B

BUSINESS AND COMMERCE
Mental Health; Applicability of Professional Corp. Act to Foreign Corp. Providing Psychiatrists for Area Mental Health Program 92

C

CLERKS OF SUPERIOR COURT (See Courts, Clerk of Superior Court)

CONFLICT OF INTEREST (See Public Officers and Employees)

CONSTITUTIONAL LAW
Executive Powers; Authority of the Gov. of N.C. to Transfer Office of Child Dev. from N.C. Dept. of Admin. to N.C. Dept. of Human Res. and State Office of

Economic Oppor. from N.C. Dept. of Human Res. to N.C. Dept. of Admin.; Art. III, Sec. 5(10) of Const. of N.C. 69
Religion; Highway Map 80

CONTRACTS (See Public Contracts)

CORPORATIONS
Mental Health; Business and Commerce; Applicability of Professional Corp. Act to Foreign Corp. Providing Psychiatrists for Area Mental Health Program 92
Professional Corp. Act; G.S. 53-127; G.S. 55B-3 100

COUNTIES
Health; Definition and Abatement of Mass Gatherings as Nuisances 142
Municipal Corporations; Public Utilities; Authority of Counties and Municipalities to Own or Engage in Business of Operating Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest in, Operate, Subsidize or Finance Operations of Such Public Utilities through a Joint Agency or Nonprofit Corporation 85

COURTS
Clerk of Superior Court; Compliance with Judgment; Lack of Jurisdiction of Court to Enter Judgment; Interpretation of G.S. 7A-111 97
Costs; Special Proceedings; Suits *in Forma Pauperis* 147
Infants and Incompetents; Concurrent Jurisdiction Over Juveniles on Probation 187
Juveniles; Mental Health; Authority of District Court Judge to Order Placement of Juveniles in Centers for Mentally Retarded 126

Mental Health; Authority of Trial Judge to Direct Verdict of Not Guilty by Reason of Insanity 124

CRIMINAL LAW AND PROCEDURE
Law Enforcement; Juveniles; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq. 179

D

DOUBLE OFFICE HOLDING
Conflict of Interest; Member of Town Aldermen Serving as Member of Town's Auxiliary Police 123

DRIVERS' LICENSES (See Motor Vehicles; Drivers' Licenses)

E

ELECTIONS
Absentee Ballots; Validity of Absentee Ballots when Voter Expects to be Absent from County but is Not Absent on Election Day 110
Form of Local Ballots; Location of Party Columns 72

EXECUTIVE POWERS
Constitutional Law; Authority of the Gov. of North Carolina to Transfer Office of Child Dev. from N.C. Dept. of Admin. to N.C. Dept. of Human Res. and State Office of Economic Oppor. from N.C. Dept. of Human Res. to N.C. Dept. of Admin.; Art. III, §5(10) of Const. of N.C. 69

F

FACILITY SERVICES
Licensing; Appeal from Denial or Revocation of License of a Home for the Aged and Infirm or a Family Care Home 46
Licensing; Public Access to Licensure Records of Homes for the Aged and Infirm and Family Care Homes 137

FINGERPRINTING
Law Enforcement; Juveniles; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq. 179

H

HEALTH
Counties; Definition and Abatement of Mass Gatherings as Nuisances 142
Education; Immunization Requirements Detrimental to Child's Health 155
Public Records; Reports of Medical Examiners; Autopsy Reports 193
Regulation of Sewage Disposal in Foodhandling and Lodging Establishments; Construction of G.S. 72-46, G.S. 130-160 and G.S. 143-215 18
Sanitation of Food and Lodging Establishments; Definition of "Private Clubs" and "Occasional"; G.S. 72-49 182
Solid Waste Disposal; Ch. 130, Art. 13B; G.S. 153A-292; Applicability of Local Ordinances 40
Student Records; Reporting of Certain Diseases; Construction of Public Law 93-380 and G.S. 130-81 163

HIGHWAY MAP
Constitutional Law; Religion 80

I

INFANTS AND INCOMPETENTS
Courts; Concurrent Jurisdiction Over Juveniles on Probation 187
Mental Health; Rights of Minor Patients in Treatment Facilities 3
Mental Health; Voluntary Admission of Runaway Minors to Treatment Facilities 6
Youth Development, State Dept. of; Medical Treatment for Students; Consent for Surgical Operations on Minor Students 21

INSURANCE
Title Insurance; Attorneys; Proceeds from Title Insurance Agency; G.S. 58-135.1 114

J

JUVENILES (See also Social Services and Infants and Incompetents)
Correction, Dept. of; Division of Youth Development; Photographing Juveniles 146
Courts; Mental Health; Authority of District Court Judge to order Placement of Juveniles in Centers for Mentally Retarded 126
Law Enforcement; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq. 179

L

LICENSES AND LICENSING
Wastewater Treatment Plant Operators Certification Commission; (G.S. 90A-35, et seq., as amended by G.S. 143B-300); Considered to be an Occupational Licensing Board as Defined by G.S. 93B-1, et seq. 144

MEDICAID (See Social Services)

MENTAL HEALTH
Area Mental Health Boards; Authority to Set Salaries of Employees 67
Area Mental Health Programs; Removal of Area Mental Health Board Members; Terms of Area Mental Health Board Officers 197
Area Mental Health Programs; Single County Program as a Public Authority 185
Area Mental Health Programs; Testing of Individual Models for Delivery of Mental Health Services 105
Business and Commerce; Applicability of Professional Corp. Act to Foreign Corp. Providing Psychiatrists for Area Mental Health Program 92
Commitment Rehearings; Waiver of Notification of Time and Place of Rehearing 33
Courts; Authority of Trial Judge to Direct Verdict of Not Guilty by Reason of Insanity 24
Criminal Law and Procedure; Involuntary Commitment of a Defendant Sent to a Mental Health Facility Under G.S. 122-83 55
Examination of Mentally Ill or Inebriate Person; Responsibility of County 150
Forensic Patients; Placing Potential Escapees in Seclusion 139
Infants and Incompetents; Rights of Minor Patients in Treatment Facilities 3
Infants and Incompetents; Voluntary Admission of Runaway Minors to Treatment Facilities 6
Involuntary Commitment; Authority of

Attending Physician to Determine Place of Pre-hearing Custody 25
Involuntary Commitment; Conditional Discharge or Release of Forensic Patients 112
Involuntary Commitment; Determination of Place of Detention Prior to Commitment Hearing 15
Involuntary Commitment; Propriety of the "Qualified Physician" Acting as Physician in Charge of Treatment 36
Involuntary Commitment; Release of Patient Charged with Crime 189
Involuntary Commitment; Return of Respondent to Mental Health Facility for Treatment Pending Commitment Hearing 8
Involuntary Commitment; Supervision and Treatment of a Respondent Detained in a Community Mental Health Center or Regional Mental Health Facility 13
Involuntary Commitment; Voluntary Admissions; Consent to Surgery on Mental Patients; Applicability of Patients' Rights Bill to Local General Hospitals 64
Involuntary Commitment Proceedings; Vaginal Examination as Part of Pre-hearing Examination and Post-hearing Treatment 195
Local Mental Health Clinics; Authority to Issue a Certificate of Incompetence Under G.S. 35-3 190
Mentally Ill or Inebriate Persons; Patients' Rights; Contraband; Search and Seizure; Regulation of Parking; Assault 27
Mentally Ill or Inebriate Persons; Transportation to State Hospital; Responsibility of County 45
Personnel; Exemption of Physicians from Mandatory Retirement at Age 65 102
Transfer of Mentally Ill Person or Inebriate

to N.C. Mental Health Facility from Another State; Duration of Detention of Transferred Patient and Nature of Additional Commitment Proceedings Required 134
Voluntary Admissions; Applications for Admission to Treatment Facilities by Persons who are *Non Compos Mentis* 74
Voluntary Admissions; Involuntary Return, Involuntary Commitment, and Discharge of Escapee from a Treatment Facility 52

MILK COMMISSION
Sale of Milk by Retail Stores as "Loss Leader"; Sales Below Cost 169

MOBILE HOMES
State Building Code; Local Minimum Housing Code, Applicable to Mobile Homes, Except as to those Items Required to be Pre-inspected During Manufacturing Process; G.S. 143-138; G.S. 143-144, et seq. 132

MOTOR VEHICLES
Driver's License; Limited Driving Privileges; Bond Forfeiture 44
Driver's License; Points, G.S. 20-16, and Provisional Licensee, G.S. 20-13; Moving Violation 101
Emergency Warning Devices; Civil Air Patrol Emergency Service Vehicles 63
Motor Vehicle Dealers; Use of Dealer Plates 188
Registration Rental Vehicles; U-Haul (G.S. 20-84.2) 165

MUNICIPAL CORPORATIONS
Counties; Public Utilities; Authority of Counties and Municipalities to Own or Engage in Business of Operating

Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest in, Operate, Subsidize or Finance the Operations of such Public Utilities through a Joint Agency or Nonprofit Corporation 85
Public Officers, Dual Office Holding, Conflict of Interest; Member of Town Aldermen Serving as Member of the Town's Auxiliary Police - G.S. 160A-284, G.S. 160A-282 123

P

PAROLE
Escape; Detainers 108
Officers; Arrest 117
Work Release; Term of Imprisonment 76

PRISONS AND PRISONERS
Criminal Law & Procedure; Escape, Warrants; Arrest 109
Study Release 154
Work Release; Parole Commission 38
Work Release; Union Activities 157

PROFESSIONAL CORPORATION ACT (See Corporations)

PUBLIC CONTRACTS
Bid Bonds; Incomplete Bid Bonds; Minimum Number of Bids 77
Conflict of Interest; Public Officers; City Contracting with Corporation in which Councilman is Officer - Void Contract 128
Counties; Lease-Purchase Contract Subject to Public Bidding Requirements of Art. 8, Ch. 143 59
Purchase and Contract Div.; Boards of Education; Community Colleges; Purchase of Supplies; Material and Equipment; Printing 176

PUBLIC OFFICERS AND EMPLOYEES
Parole; Arrest 117
Public Contracts; Conflict of Interest; City Contracting with Corp. in which Councilman is Officer - Void Contract 128
State Employees; Fourteenth Amendment; Personal Privacy 159

PUBLIC UTILITIES
Counties; Authority of Counties and Municipalities to Own or Engage in Business of Operating Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest in, Operate, Subsidize or Finance the Operations of such Public Utilities through a Joint Agency or Nonprofit Corp. 85

R

REORGANIZATION OF STATE GOVERNMENT (See State Depts., Institutions and Agencies)

S

SOCIAL SERVICES
Authority to Contract for Medicaid Services Payments by a Fiscal Agent; G.S. 108-60 172
Closed-End Budget for Financing Programs of Public Assistance at County Level; C.1418, S. L. 1973, 2nd Sess; Legality of Soc. Serv. Comm. Proviso 30
Juvenile Hearings in Cases Involving Child Neglect and/or Abuse and Termination of Parental Rights; Evidence; Admissibility of Records Made by Social Workers No Longer Employed by Co. Dept. of Soc. Ser. 94
Medical Assistance Program; Propriety of Assigning Title XIX (Medicaid) Provider

Numbers to Part-Time Dental Consultants with the Medical Services Section of the Division of Social Ser. 174
Social Services Commission; Standards for Selection of County Social Services Board Members 183

STATE DEPARTMENTS, INSTITUTIONS AND AGENCIES

Aid to the Blind, C. 111, General Statutes; Legal Authority of the Div. of Ser. for Blind to Enter into Contract with Mfr's. Repres. Under Specific Exemption in G.S. 111-27.1 50
Alcoholism Research Authority; Appropriations; Expenditures; Agreements; Overhead Expenses of Research Facilities; Payment by Authority 106
Constitutional Law; Executive Powers; Authority of Gov. of N.C. to Transfer Office of Child Dev. from N.C. Dept. of Admin. to N.C. Dept of Human Res. and State Office of Economic Opportunity from N.C. Dept. of Human Resources to N.C. Dept. of Admin., Article III, Sec. 5(10) of Const. of N.C. 69
Correction, Dept. of; Amendment of Sentence 1
Correction, Dept. of; Division of Youth Development; Authority to Provide for Coeducational Youth Development Schools 116
Correction, Dept. of; Division of Youth Development; Juveniles; Photographing Juveniles 146
Economic Opportunity Agencies; Direct Grants from the Dept. of Human Resources; Ch. 1318 of 1973 Sess. Laws, 2nd Session 60
Human Resources, Dept. of; Division of Facility Services - (See Facility Services)
Human Resources, Dept. of; Division of Health Services - (See Health)

Human Resources, Dept. of; Division of Mental Health - (See Mental Health)
Human Resources, Dept. of; Division of Social Services - (See Social Services)
Milk Commission; Sale of Milk by Retail Stores as "Loss Leader"; Sales Below Cost 169
Natural and Economic Resources, Dept. of; Sedimentation Control Commission; Chairman 9
Purchase and Contract Division; Boards of Education; Community Colleges; Public Contracts; Purchase of Supplies, Material and Equipment; Printing 176
Reorganization; Relationship Between N.C. Ports Authority and N.C. Dept. of Transportation 141
Reorganization; Transfer of the State Ports Authority by a Type II Transfer to the Department of Transportation 166
University of N. C.; Student Activities; Fee 120
Youth Development Div.; Correction, Dept. of; Authority to Provide for Coed Youth Dev. Schools 116
Youth Development Div.; Infants and Incompetents; Medical Treatment for Students; Consent for Surgical Operations on Minor Students 21

T

TAXATION
Ad Valorem; Classification; Real Property Belonging to Elks Club; G.S. 105-278(19) 160

Y

YOUTH DEVELOPMENT SCHOOLS (See State Departments, Institutions and Agencies)

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NORTH CAROLINA

ATTORNEY GENERAL

REPORTS

Opinions of the Attorney General
January 1, 1975 through June 30, 1975

MAILING ADDRESS:
Post Office Box 629
Raleigh, North Carolina 27602

RUFUS L. EDMISTEN
Attorney General

Harry W. McGalliard
Chief Deputy Attorney General

Jean A. Benoy
James F. Bullock
I. Beverly Lake, Jr.
Andrew A. Vanore, Jr.

Robert Bruce White, Jr.
Deputy Attorneys General

Charles H. Smith
Administrative Deputy
Attorney General

Howard A. Kramer
Deputy Attorney General
for Legal Affairs

John A. Elmore, II
Special Assistant to the Attorney General

Myron Banks
James L. Blackburn
George W. Boylan
William F. Briley
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H. Al Cole, Jr.
T. Buie Costen
Donald A. Davis
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Conrad O. Pearson
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Alfred N. Salley
John M. Silverstein
* Norman L. Sloan
Eugene A. Smith
Edwin M. Speas, Jr.
Robert G. Webb
Wm. Woodward Webb

Assistant Attorneys General

John W. McDevitt, Consultant
Herbert Lamson, Jr., Claims Attorney
Charles J. Murray, Revisor of Statutes

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Archie W. Anders
Jesse C. Brake
E. H. Bunting, Jr.
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Robert R. Reilly
Thomas M. Ringer, Jr.
Jerry J. Rutledge
James M. Wallace, Jr.
Raymond L. Yasser

Associate Attorneys

* Resigned
** On Leave of Absence

8 January 1975

Subject: Courts; Social Services; Child Abuse; Husband-Wife Privilege in Criminal Prosecutions

Requested by: Mr. James A. Blakley, Director
Burke County Department of Social Services

Question: Can one spouse testify against the other spouse who is a defendant in a North Carolina criminal action growing out of a report of child neglect when:

(a) the wife observed the husband rape their eleven-year-old daughter and the husband is being tried for first degree rape?

(b) the husband observed the wife beat their nine-month-old child causing brain damage and the wife is being tried for assault with a deadly weapon with intent to kill resulting in serious injury?

Conclusion: In both of the situations described the spouse can testify against the other spouse.

G.S. 8-57 reiterates the common law rule which, in general, prohibited compelling one spouse to testify against another marital partner who is the subject of criminal prosecution. See *State v. Alford*, 274 N.C. 125 (1968); *State v. Spain*, 3 N.C. App. 266 (1968). One exception to the general rule as set forth in this statute is that "...for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse...it shall be lawful to examine a spouse in behalf of the State against the other spouse...."

G.S. 8-57.1 further and more explicitly addresses cases involving child abuse where the victim is below sixteen years of age, as follows:

"§ 8-57.1. *Husband-wife privilege waived in child abuse.*–Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina."

Inasmuch as the cases described in the present question clearly fall within child abuse as defined in G.S. 110-117(1), this statute is controlling and removes any possible doubt that the receipt of testimony of a spouse in the situations as described is permissible.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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8 January 1975

Subject: Health; Medical Care Commission; Exemption from Certified Ambulance Attendant Requirement

Requested by: Dr. Richard R. Nugent, Director
Regionalized Perinatal Health Care Project

Question: May a pediatric nurse be substituted for a certified ambulance attendant on pediatric missions?

Conclusion: A pediatric nurse may be substituted for a certified ambulance attendant on pediatric missions if the Department of Human Resources finds such to be in the public interest and the Medical Care Commission adopts a regulation so providing.

G.S. 130-233(a) provides:

> "§ 130-233. *Certified ambulance attendant required.* - (a) Every ambulance, except those specifically excluded from the operation of this Article, when operated on an emergency mission in this State shall be occupied by the driver plus at least one person who possesses a valid ambulance attendant's certificate from the Department of Human Resources. The North Carolina Medical Care Commission shall adopt regulations setting forth exemptions to this requirement applicable to situations where exemptions are considered by the Department to be in the public interest."

The above subsection requires that a certified ambulance attendant accompany a driver on an emergency mission. A program, under consideration, contemplates substitution of a pediatric nurse for a certified ambulance attendant on pediatric missions. The correspondent indicates that a pediatric nurse has more specialized training in his or her field than a certified ambulance attendant but does not have sufficient overall training to qualify as a certified ambulance attendant.

It is the opinion of this Office that the second sentence of the subsection permits such a substitution if and when the Department of Human Resources finds such to be in the public interest and the Medical Care Commission adopts a regulation so providing.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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8 January 1975

Subject: Mental Health; Corrections; Infants and Incompetents; Commitment of Mentally Retarded Juveniles to Centers for Retarded by Department of Correction

Requested by:	Mr. James P. Smith Senior Administrative Assistant N. C. Department of Correction
Question:	Is the legal relationship between the Division of Youth Development and a juvenile committed to its custody such that the Division of Youth Development would qualify as a person standing *in loco parentis* or as a duly appointed guardian of the person of the juvenile so that under G.S. 122-70 the Division of Youth Development could commit a juvenile in its custody to a center for the mentally retarded without a judicial hearing?
Conclusion:	The Division of Youth Development has no authority to commit to a center for the mentally retarded a juvenile who has been committed to the custody of the Division of Youth Development by a juvenile court.

The resolution of this question is rendered difficult by the provisions of several sections of the General Statutes, each levying decisional authority and obligations on different officials or agents, but all obviously intended to protect the rights of the juveniles concerned.

Initially, there is no authority for a court ordered commitment to a center for the mentally retarded. G.S. 122-70 provides for *admission of a person to a center upon application by the appropriate parent*, etc. G.S. 122-71.1 vests authority in the Department of Human Resources to discharge residents of the centers upon requests of the parent, etc., or when "...in the judgment of the Department of Human Resources, it will not be beneficial to such person or to the best interest of the center that such person be retained longer therein." See 43 N.C.A.G. 231 (1973) and 43 N.C.A.G. 163 (1973) for further elaboration on the authority of a juvenile court to "secure" proper action in a juvenile case.

The options open to a juvenile court in the disposition of a juvenile case are spelled out in G.S. 7A-286(6). In the opinion of the

Attorney General to Dr. Ann F. Wolfe, dated 3 October 1974, to be promulgated in 44 N.C.A.G. 126, we noted the following language presently contained in G.S. 7A-286(6):

> "If the court believes, or if there is evidence presented to the effect that the child is mentally ill or is mentally retarded, the court shall refer the child to the area mental health director or local mental health director for appropriate action. In no case will a child be committed directly to a State hospital or mental retardation center. The area mental health director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the child and mobilizing resources to meet the child's needs. If institutionalization is determined to be the best service for the child, then admission shall be with the voluntary consent of the parent or guardian; provided, that the consent of the parent or guardian shall not be required in those cases wherein the alternative to admission to a State hospital or mental retardation center in (sic) the commitment of the child to a juvenile corrections facility."

Worthy of reiteration at this time are our comments in that prior opinion that:

> "...it appears patent that the General Assembly by this latest amendment has, in unambiguous language, dispelled any question as to the authority of the court to order commitment of a juvenile to one of the centers. The clear language of the present statutes requires admission only upon application as provided in Article 9, with the responsibility for applying being placed upon the 'area mental health director or local mental health director', and with the necessity for parental consent depending upon the existence of the circumstances as described in G.S. 7A-286(6)."

As was recognized in the correspondence posing the present query, G.S. 134-11 and G.S. 134-16 deal with the subject of disposition

of juveniles unable to benefit from your Department programs. The statute permits the initial commitment to the Department of Correction of persons "not mentally or physically incapable of being substantially benefited" by a program of a unit thereof.

The latter statute permits the Department to return to the court a committed juvenile who is determined to be "mentally or physically incapable of being benefited by" the services available at the place of commitment. Also see G.S. 7A-286(5) to the same general effect.

It does not appear that the Department of Correction falls within the description of personnel authorized to request admittance of juveniles to North Carolina Centers for mentally retarded. Equally important, it also appears that the 1973 General Assembly (1974 Session) has clearly expressed an intent that the responsible Department of Correction personnel and mental health personnel be the final arbiters, respectively, as to the placement of juveniles in their correctional or mental retardation facilities. Upon determination of experts in each of these areas that a given juvenile cannot benefit from available correctional or mental retardation programs, it would appear that the juvenile court would be limited to directing a course of action falling within the other avenues of disposition of the case as prescribed in G.S. 7A-286.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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8 January 1975

Subject: State Departments, Institutions and Agencies; Real Property; Leases; Advertisement for Proposals for Space to be Leased by State

Requested by: Mr. Nat H. Robb, Director
Real Property Section
Department of Administration

Question: Pursuant to G.S. 146-25.1, a State agency has advertised for proposals from prospective lessors for space needed to be leased by the agency. The advertisement fixed a definite time within which proposals must be received by the agency. May the agency consider a proposal submitted by a prospective lessor after the time fixed for submission of proposals has expired?

Conclusion: No.

Pursuant to G.S. 146-25.1, the North Carolina Department of Transportation and Highway Safety advertised for proposals from prospective lessors for space needed to be leased by the Department. The advertisement provided that proposals were to reach the Department no later than 10:00 a.m., October 31, 1974, and further provided that the proposals would be immediately opened in Room 122 of the Highway Building. Several proposals were submitted by prospective lessors and received by the Department within the time specified in the advertisement. Several weeks after the proposals were opened, an additional proposal was solicited from another prospective lessor with whom the Department now desires to enter into a lease.

The clear intent and purpose of G.S. 146-25.1 was to require competitive bidding when the State desires to lease space and the rental will exceed $7500.00 per year or the lease term will exceed three years. When competitive bidding is required, it is generally held that it is essential that some time limit be fixed within which bids must be submitted. It is likewise generally held that new or amended bids submitted after that time and after bids have been opened should not be considered. 53 Am. Jur. 2d, *Public Works and Contracts*, §54.

The consideration of a bid or proposal received subsequent to the time specified and after bids have been opened would not be within the spirit of the competitive bidding requirements of G.S. 146-25.1. If no satisfactory proposal is received by the agency within the time specified for submission of proposals, the proper procedure would

be to reject all proposals and re-advertise in accordance with G.S. 146-25.1.

Rufus L. Edmisten, Attorney General
Roy A. Giles, Jr.
Assistant Attorney General

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8 January 1975

Subject: Juveniles; Jails; Detention of Juveniles to be Tried as Felons

Requested by: Mr. Woodburn Williams, Head
Jail and Detention Branch
Division of Facility Services
Department of Human Resources

Questions: (1) On and after July 1, 1975, if a county in North Carolina has a juvenile detention facility and if a child in such county who has reached his fourteenth birthday is charged with one of the felony crimes which may allow him to be tried in superior court, must the child still be detained in the juvenile detention facility or may he be detained in adult county jail?

(2) On and after July 1, 1975, if a child between the ages of 14 and 16 years is to be tried in superior court for a felony and is ordered confined in the county juvenile detention facility by the juvenile division of the district court, can any authority or judicial officer order the child moved to and detained in the county jail?

(3) On and after July 1, 1975, in a county which has a juvenile detention facility, does the director of the juvenile

detention facility or any other county official have authority to deny acceptance of a child under 16 so ordered by the court to be detained in the juvenile detention facility?

Conclusions:

(1) On and after July 1, 1975, the child described may be detained while awaiting trial only in the juvenile detention facility, except for a preliminary period of 72 hours during which he may be held in a hold-over facility for juveniles appropriately established in a jail.

(2) On and after July 1, 1975, no authority or judicial officer can order the child described moved to and detained in a county jail prior to trial; after the beginning of the trial, the custody of the defendant is the responsibility of the trial judge who is authorized to direct such degree of restraint as he deems to be appropriate.

(3) After July 1, 1974, the director of the juvenile detention facility or any other county official does not have authority to deny acceptance of the child under 16, as described, who has been ordered by the court to be detained in a juvenile detention facility.

G.S. 7A-280 provides, and has provided for some time, for the trial of felony charges of a child who has reached his fourteenth birthday if this disposition of the case is found to be appropriate by the juvenile court judge. This Section further provides that, upon transfer of any case to the superior court division for such trial, the juvenile court judge may order that the child be detained in a juvenile detention home or a separate section of a local jail as provided by G.S. 110-24 pending trial.

G.S. 110-24 was rewritten by the 1974 Session of the General Assembly. Similarly, G.S. 153A-221.1 was also revised in 1974 and these two sections (effective July 1, 1975) must be read in conjunction to determine the legislative intent. G.S. 110-24 unequivocally states that, except for the authority to detain a child in a jail with a "hold-over facility for juveniles", it will be unlawful for any child coming within the provisions of Article 23, Chapter 7A, to be placed in any jail, prison or other penal institution where he will come into contact with adults charged with or convicted of crimes. G.S. 153A-221.1 limits placement in that type of hold-over facility in a local jail to not more than 72 hours pending placement in a juvenile detention home; it further specifically requires that the local jail be so arranged that the child is isolated from the adult population.

The composite provisions of the governing statutes clearly delineate what facilities may be used for detention prior to trial in the case of a child and afford no justification for the refusal to accept him in a juvenile detention facility. Of course, once the trial has begun, the determination of the extent and nature of the custody imposed falls within the discretion of the trial judge. See *State v Mangum*, 245 N. C. 323 (1957); *State v Smith*, 237 N. C. 1, 21 - 22 (1953).

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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13 January 1975

Subject: Taxation; Ad Valorem; Classifications; Lands and Properties Belonging to The University of North Carolina at Chapel Hill; G.S. 116-16

Requested by: Mr. Ferebee Taylor
Chancellor
The University of North Carolina
at Chapel Hill

Question: Are the lands and other properties belonging to The University of North Carolina at Chapel Hill, or held on behalf of The University of North Carolina at Chapel Hill by the State of North Carolina or by the Board of Governors of The University of North Carolina, subject to ad valorem taxation?

Conclusion: The lands and other properties belonging to The University of North Carolina at Chapel Hill, or held on behalf of The University of North Carolina at Chapel Hill by the State of North Carolina or by the Board of Governors of The University of North Carolina, are not subject to ad valorem taxation.

Article V, Sec.2(2) of the Constitution of North Carolina provides:

> "*Classification*. Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government."

Pursuant to the foregoing authority, the General Assembly has enacted North Carolina G.S. 116-16, which provides:

> "*Tax exemption*.–The lands and other property belonging to the University of North Carolina shall be exempt from all kinds of public taxation."

The above provision demonstrates the desire and intent of the Legislature to remove from "all kinds of public taxation" the land and other property belonging to The University of North Carolina. "The legislative intent is the guiding star in the interpretation of statutes." *Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C.

155, 123 S.E. 2d 582 (1961). Thus, the Legislature has utilized its constitutional powers to classify this property and in so doing has removed it, not partially, but entirely from all taxation. Legislative classifications are presumed to be valid and will not be disturbed by the courts unless capricious, arbitrary, and unjustified by reason. *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E. 2d 19 (1940). This present classification is neither arbitrary nor capricious and is certainly reasonable.

If this statute were an exemption statute, it might exceed constitutional limits as to any properties not devoted to a public or governmental purpose (if that should be the case). *Redevelopment Comm. v. Guilford County*, 274 N.C. 585, 164 S.E. 2d 369 (1968). However, if a statute may be given a constitutional construction, it will be given such construction, because there is a presumption in favor of the constitutionality of a statute. *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961). For that reason, we are satisfied that the statute reasonably construed constitutes a proper exercise of the classification power.

Since the words "belonging to" which are used in G.S. 116-16 mean "having in possession", (*City and County of San Francisco v. McGovern*, 28 Cal. App. 491, 152 P 980 (1915)), the statute is not limited to the lands and properties actually owned by the University of North Carolina but the phrase "belonging to" also includes lands and properties held on behalf of the University of North Carolina at Chapel Hill by the State of North Carolina or by the Board of Governors of the University of North Carolina.

Based upon the provisions of G.S. 116-16, designating the University of North Carolina lands and properties as a special class, it is apparent that the lands and other properties belonging to the University of North Carolina at Chapel Hill, including those held by the State of North Carolina or by the Board of Governors of the University of North Carolina on behalf of the University of North Carolina at Chapel Hill, were not intended by the General Assembly to be subject to ad valorem taxation, and are not subject to it.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Norman L. Sloan
Assistant Attorneys General

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28 January 1975

Subject: Infants and Incompetents; Corrections; Abortions; Consent for Abortion on Minor Female Committed to Division of Youth Development

Requested by: Mr. James P. Smith
Senior Administrative Assistant
N. C. Department of Correction

Questions: (1) Who has the authority to consent to an abortion on a minor female during the first trimester of her pregnancy when she has been committed to the Division of Youth Development?

(2) Is the consent of a minor female who has been committed to the Division of Youth Development necessary in order to perform an abortion on her during the first trimester of her pregnancy?

Conclusions: (1) In the situation described, the minor female involved has the authority to consent to an abortion.

(2) In the situation described, the consent of the minor female involved is necessary in order to perform an abortion.

G.S. 14-45.1 sets forth the circumstances wherein performance of an abortion in this State is not unlawful. As pertinent to the questions posed, this statute provides that: "...it shall not be

unlawful, during the first 20 weeks of a woman's pregnancy, to advise, procure, or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina...." Significantly, nowhere in the current statute is a minimum age for the woman prescribed, nor are there any provisions distinguishing situations involving minors.

Review of the history of the present statute reveals that it was ratified by the General Assembly subsequent to the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Interestingly enough, the predecessor of the present G.S. 14-45.1 made certain provisions for situations involving minor females, and the U.S. Supreme Court took cognizance of our statute in Footnote 67 of *Roe*:

> "North Carolina, for example,...requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age...; if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional."

To date, the United States Supreme Court has not shed any further light upon the situation involving a minor female. Thus, we must look to the language of the decision itself. Throughout that landmark decision,.the Supreme Court repeatedly emphasized that the decision on an abortion during the first trimester of pregnancy should be solely between the female and her doctor.

The following language from the majority decision in *Roe* really leaves little doubt as to the position of the Supreme Court:

> "...for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

* * *

> For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."

In the face of this plain language, it appears impossible to engraft any age requirement on the decisional ability of a pregnant female during the first trimester. Presumably the General Assembly recognized this fact by leaving out any reference to age at the time of completely revising G.S. 14-45.1.

It is noted that G.S. 130-191 sets forth certain requirements preliminary to an "operation" performed on a minor in "any penal or charitable hospital or institution of the State of North Carolina." It is highly conjectural that an abortion would fall within the definition of an "operation". In any event, however, in view of the plain language of the Supreme Court in *Roe*, no additional consent may be required in a situation wherein the pregnant female and her doctor have determined upon an abortion as the proper course of action during the first trimester of the pregnancy.

In passing, it is noted that previous opinions of the Attorney General appearing at 41 N.C.A.G. 709 (1972) and 41 N.C.A.G. 862 (1972) were based upon the prior General Statute; therefore, they are no longer current and should be disregarded. Further, the portion of the opinion of the Attorney General dealing with abortion as set forth in 41 N.C.A.G. 489, at page 495, should be disregarded for the same reason. Additionally, the opinion of the Attorney General to Mr. John R. Larkins, dated 17 July 1974, promulgated at 44 N.C.A.G. 21 (1974), should not be interpreted to include abortions within the conclusions set forth.

With regard to the second question, the consent of the minor female is an absolute prerequisite for an abortion and no source of authority exists for forcible abortion over the objection of such female.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

28 January 1975

Subject:	Counties; Zoning Authority; State-Owned Property; Highway Rights of Way
Requested by:	Mr. John G. Scott Director of Planning Wake County Planning Department
Question:	Does the county have zoning jurisdiction over State-owned property, including highway rights of way?
Conclusion:	The county has zoning jurisdiction over State-owned property, except State highway rights of way over which it has no zoning authority.

Article 18 of Chapter 153A provides for the planning and regulation of development in the counties. *Part 3* including G.S. 153A-340 through 153A-347 provides for zoning. G.S. 153A-340 provides that the county may regulate and restrict buildings and structures and land for trade, industry, residence, or other purposes, except farming.

The general rule is that the General Statutes do not apply to the State except as specifically made applicable therein. G.S. 153A-347 specifically provides for State buildings. G.S. 153A-347 provides that "Each provision of this Part is applicable to the erection, construction, and the use of buildings by the State of North Carolina and its political subdivisions." It is the opinion of this Office that the provisions of *Part 3*, Article 18 relating to zoning apply to the erection, construction and use of buildings by the State, except in connection with the use of highway rights of way for the reasons hereinafter indicated.

The requirement for obtaining permits is referred to in your letter of January 10, 1975. *Part 4* of Article 18 relates to building inspection. *Part 4* includes G.S. 153A-357 which requires permits for the construction of buildings. There is no statute which specifically makes the provisions of *Part 4* including G.S. 153A-357

applicable to the State. G.S. 143-135.1 specifically exempts the State and its agencies from the requirements of obtaining building permits. See 40 N.C.A.G. 735 wherein the opinion is expressed by this Office that no building permit is required by State agencies.

G.S. 136-18 vests the control over State highways in the Board of Transportation. Generally the Board of Transportation has only authority to acquire rights of way for highway purposes. Land so acquired for rights of way may not be leased or used for private purposes. 26 Am. Jur. 2d. Eminent Domain ¶143, page 806 and ¶144, page 807; 30 C.J.S. Eminent Domain ¶459, page 662. "The power to authorize the use of highways for a special purpose or in a special manner is vested in and controlled by the Legislature and may be exercised directly by the Legislature or delegated by governmental agencies. When such power has been delegated, the power is vested by the statute or charter provisions delegating such authority." 39 Am. Jur. 2d Highways § 214, *Elizabeth City v. Banks*, 150 N.C. 407; 64 C.J.S. Municipal Corporations ¶1719, page 136. Condemnation establishes in the Board of Transportation a right to use the land appropriated for all purposes for which the Board is authorized by law to subject the right of way. *Hildebrand v. Telephone Company*, 221 N.C. 10 (1942); 43 N.C.A.G. 119 at page 121; 43 N.C.A.G. 366. This Office has an expressed opinion that a rest area building is a highway structure which is an integral part of the highway, the necessity of such structures being determined by the Board of Transportation. 40 N.C.A.G. 541. The General Statutes specifically provide that "rest area buildings" and "weight stations" are highway construction and repair for the purpose of awarding highway construction contracts and for the purpose of the Executive Budget Act. G.S. 136-28.1.

G.S. 136-18 and G.S. 136-93 specifically grant the Board of Transportation authority to control the use of the highway rights of way and the authority to issue permits for certain encroachments upon the State highway rights of way.

G.S. 153A-121 grants to counties general police power, but Subsection (b) provides:

> "This section does not authorize a county to regulate or control vehicular or pedestrian traffic on a street

or highway under the control of the Board of Transportation, nor to regulate or control any right-of-way or right-of-passage belonging to a ... public agency of the State. In addition, no county ordinance may regulate or control a highway right-of-way in a manner inconsistent with State law or an ordinance of the Board of Transportation."

Therefore, it is the opinion of this Office that there is no legislative grant of zoning control to counties over State highway rights of way, as the Board of Transportation is granted authority to determine the highway uses the right of way is to be put to and the Legislature specifically granted to the Board of Transportation the authority to regulate and control encroachments on the highway right of way. As no particular easements controlled by State agencies except for State highway rights of way have been considered herein, no opinion is expressed herein as to those not considered in this opinion.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Assistant Attorney General

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28 January 1975

Subject: Mental Health; Patients' Rights; Liability of Patients for Damage to Personal Property

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services

Questions: If a patient in a North Carolina treatment facility for the mentally ill, mentally retarded or inebriate damages the automobile of a facility employee when the vehicle is parked in a duly authorized parking area at the facility:

(a) may the patient voluntarily pay for the damages out of his funds?

(b) may the patient be forced administratively to pay for the damages out of his funds?

Conclusions: In the situations described:

(a) a patient who has not been adjudicated incompetent may voluntarily pay for the damages out of his funds.

(b) a patient may not be administratively forced to pay for the damages.

G.S. 122-55.2 provides, *inter alia*,

> "(c) Each adult patient of a treatment facility shall retain the right to exercise all civil rights, including the right to dispose of property, execute instruments, make purchases, enter into contractual relationships, register and vote, and marry and obtain a divorce, unless such patient has been adjudicated incompetent under the provisions of Chapter 35 of the General Statutes and has not been restored to legal capacity; provided, however, that this Part shall not be construed as validating the act of any patient who was at the time of the act in fact incompetent."

This provision clearly authorizes patients in the treatment facility to conduct their own business, absent an adjudication of incompetency. Therefore, payment of the sort described by a patient who is clearly competent would be authorized. However, in view of the last portion of the quoted statute, if any doubt exists as to the patient's *de facto* competency, payment should not be accepted.

As to the requirement by virtue of administrative means of an involuntary payment by a patient, such would obviously be a violation of the patient's "civil rights". In situations where a patient has been adjudicated to be incompetent, voluntary payment of the damages by a guardian whose authority extends to that type of action may be accepted. In the event that involuntary payment is sought, the same type of legal action required in adjudication of the pecuniary liability of any other citizen would be required.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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28 January 1975

Subject: Mental Health; Public Officers and Employees; Appointment to Area Mental Health Boards

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services

Questions: (1) May a county employee also be a member of an area mental health board?

(2) May a public officer of a county also be a member of an area mental health board?

(3) Do the same answers apply with regard to a county employee or public officer who also serves as chairman of an area mental health board?

Conclusions: (1) A county employee may also be a member of an area mental health board so long as that appointment does not result in a conflict of interest as prohibited by G.S. 14-234.

(2) A public officer of a county may also be a member of an area mental health board so long as such appointment does not result in a conflict of interest as prohibited by G.S. 14-234 and so long as it does not result in the dual office holding prohibited by G.S. 128-1.1.

(3) The same answers apply with regard to a county employee or public officer who is a member of an area mental health board and is also serving as chairman of the area mental health board.

This Office has previously concluded that an area mental health board is a separate legal entity from the county or counties it serves. See opinion of the Attorney General to Mr. Harlan E. Boyles, dated 3 December 1974, 44 N.C.A.G. 185 (1974); opinion of the Attorney General to Mr. R. J. Bickel, dated 3 September 1974, 44 N.C.A.G. 67 (1974); 41 N.C.A.G. 778 (1972); 42 N.C.A.G. 120 (1972).

With this in mind, in evaluating an individual situation, it is necessary to recognize the different categories of personnel involved. An employee is one occupying a position of employment or contract; whereas, a public officer is one to whom functions of the sovereign authority of the government have been delegated.

As to the appointment of a county employee, so long as the conflict of interest types of situations described by G.S. 14-234 are avoided, there is no prohibition against appointment to the area mental health board. See 43 N.C.A.G. 125 (1973). A public officer of a county is also barred from assuming a position which would result in a conflict of interest proscribed by G.S. 14-234. Additionally, with regard to public officers, the provisions of Article VI, Section 9, of the North Carolina Constitution, and G.S.122-1.1 are pertinent. As a result, a public officer is authorized to hold an elective office in State or local government and to hold concurrently therewith one other appointive office in either State or local government. Thus, as long as these limits on dual office holding are not exceeded, no problem is envisioned. Compare 43 N.C.A.G. 76 (1973).

The last cited opinion dealt with the ex officio status of a county commissioner member who is appointed as an area mental health board member; inasmuch as that latter function is only an additional duty for the commissioner, the appointment was held to be non-violative of the dual office holding prohibition. So, too, when a member of the area mental health board assumes the chairmanship of the board, he is only assuming additional duties rather than an additional office. As a result, no further limitations are engrafted on the occupant of the chairmanship other than those resulting from his membership on the board.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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28 January 1975

Subject: Constitutional Law; Executive Powers; Authority of the Governor of North Carolina to Transfer the Child Day-Care Licensing Board from the North Carolina Department of Administration to the North Carolina Department of Human Resources; Article III, Section 5 (10) of the Constitution of North Carolina.

Requested by: Mr. Bruce A. Lentz, Secretary
Department of Administration

Questions: (1) May the Governor of North Carolina transfer the Child Day-Care Licensing Board from the Department of Administration to the North Carolina Department of Human Resources?

(2) Does the Executive Order effecting such transfer have to be submitted to the General Assembly for consideration?

Conclusions:

(1) The Governor of North Carolina may transfer the Child Day-Care Licensing Board from the North Carolina Department of Administration to the North Carolina Department of Human Resources.

(2) The Executive Order effecting such transfer does not have to be submitted to the General Assembly for consideration, unless that Executive Order affects the powers and responsibilities of either the Department of Human Resources or the Child Day-Care Licensing Board.

Article III, Section 5 (10) of the Constitution of North Carolina provides, *inter alia*:

> "...the Governor may make such changes in the allocation of offices and agencies (of the State) and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session..."

Article 7 of Chapter 110 of the General Statutes, creating the Child Day-Care Licensing Board, was enacted by the 1971 Session of the General Assembly. Since this Board was not assigned by the General Assembly to any State department, it was assigned by the Governor to the Department of Administration. The Governor is, therefore, empowered to effect the transfer of the Child Day-Care Licensing Board from the North Carolina Department of Administration to the North Carolina Department of Human Resources. Moreover, if such transfer in no way affects existing law, no Executive Order need be submitted to the General Assembly. If, on the other hand, the Executive Order effecting this transfer in any way affects the powers and responsibilities reposed in the North Carolina Department of Human Resources by virtue of Chapter 1318 of the 1973 Session Laws, Second Session, 1974, or the powers and responsibilities reposed in the Child Day-Care Licensing Board by

virtue of Article 7 of Chapter 110 of the General Statutes, then the Executive Order must be submitted to the General Assembly for consideration.

Rufus L. Edmisten, Attorney General
Ann Reed
Assistant Attorney General

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3 February 1975

Subject:	Motor Vehicles; Weight Limitations; Streets and Highways
Requested by:	Mr. Billy Rose State Highway Administrator
Question:	What is the legal allowable maximum gross weight of vehicles having five or more axles on the portion of the National System of Interstate and Defense Highways in North Carolina?
Conclusion:	The maximum gross weight of vehicles having five or more axles on the National System of Interstate and Defense Highways in North Carolina is 79,800 pounds.

Chapter 1449 of the 1973 Session Laws amended G.S. 20-118 to increase the load limits permitted on highways in the State to 79,800 pounds in accordance with a schedule which was similar to that proposed in the "Federal-Aid Highway Amendments of 1974" then pending in Congress. Chapter 1449 further amended G.S. 20-118 to provide that "under no circumstances shall the total weight, including tolerance, exceed 73,280 pounds on the National System of Interstate and Defense Highways unless changed by federal law."

Federal-aid laws in effect when Chapter 1449 was passed provided that federal-aid funds would not be allocated to any State which permitted load limits on the Interstate System of Highways in excess

of 73,280 pounds. Prior to the effective date of Chapter 1449, the maximum weight limit on highways in the State was 73,280 pounds as provided by G.S. 20-118. Subsequent to the passage of Chapter 1449 by the General Assembly, Congress passed the "Federal-Aid Highway Amendments of 1974" which amended 23 U.S.C. 127 to permit states to raise weight limits in accordance with a schedule, up to a maximum of 80,000 pounds on interstate highways. The weight limits referred to in the federal law are the maximum weights and apply only to the Interstate System. The individual states may set the maximum limits permitted or they may set lower limits if they desire on the Interstate System, and they can impose any controls on non-interstate highways without any federal-aid sanctions.

The amendments to the federal-aid laws contained in the "Federal-Aid Highway Amendments of 1974", though not changing or modifying the State law, did remove the restrictive limit of 73,280 pounds by increasing the maximum permitted weight on interstate and defense highways to 80,000 pounds, thereby satisfying the condition precedent created by Chapter 1449 referred to above. The condition precedent having been met, the weight limit of 79,800 pounds permitted for vehicles having five or more axles pursuant to Chapter 1449 of the 1973 Session Laws became applicable to that portion of the National System of Interstate and Defense Highways within North Carolina.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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6 February 1975

Subject: Health; County Board of Health; Limitations on Members' Terms of Service

Requested by: Mr. Clifton L. Moore, Jr.
Attorney for Pender County
Board of Health

Question: Are the provisions of G.S. 130-13(e) retroactive?

Conclusion: The provisions of G.S. 130-13(e) are not retroactive.

G.S. 130-13, in its present form effective April 5, 1973, authorizes creation of a local health board as a policy making body for a county health department. Included within the provisions relative to the composition of the board are the following limitations:

> "(e) Members of county boards of health shall serve three-year terms, but no board member may serve more than three consecutive three-year terms."

In view of the absence of any further explanatory language, the question has arisen as to whether G.S.130-13(e) has retroactive effect so as to render ineligible for further service a member of a county health board who has served three consecutive three-year terms prior to the effective date of the present statutory provisions.

Comparison of the new section with its predecessor makes it clear that the General Assembly intended to completely revamp the statute and the operations thereunder. For example: this limitation of three terms of service is, in itself, a completely new provision; the methods of selection of members are different; and the length of the terms of office have been changed. In addition, the following language found in Section 2 of the enacting legislation (Chapter 137, Session Laws 1973) is significant:

> "The terms of all members of a county board of health holding office on the date of the ratification of this act shall expire on the same date they would have had this act not been passed. Upon expiration of these terms, their successors shall be appointed to terms of three years and shall serve until their successors have been appointed and qualified. At the expiration of the term of the board member now holding office whose term first expires, the board of county commissioners shall appoint his successor and a sufficient number of persons to bring the membership of the board to nine...."

Implicit in this language is an intent to create a totally new operation under the revised statute. Equally implicit in this language, as well as in the basic provisions of the new statute, is a legislative desire to avoid any *ex post facto* effect as to members who have been appointed under the prior statute. Thus, it would appear that a member of a county board of health is limited *only* to the service of three consecutive three-year terms of appointment made pursuant to the current statute.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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6 February 1975

Subject: Mental Health; Infants and Incompetents; Appointment of Guardian; Estates

Requested by: Mrs. Eunice W. Mauney
Clerk of Superior Court
Catawba County

Question: May a clerk of superior court appoint a guardian for a minor or incompetent where such minor or incompetent has no estate?

Conclusion: A clerk of superior court may appoint a guardian for a minor or incompetent even though such minor or incompetent is without estate.

The clerk of superior court is authorized to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics and inebriates. G.S. 33-1. Under this statute where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of physical or mental weaknesses on account of old age, disease or other infirmities, the clerk may

appoint a trustee in lieu of a guardian for such person. The clerk instead of granting general guardianship to one person may commit the tuition and custody of the person to one and the charge of his estate to another. G.S. 33-6. The certificate of the superintendent of a State hospital or training school declaring an inmate or patient to be of insane mind and memory or mentally retarded is sufficient to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person.

Chapter 35, Article 2, of the General Statutes provides a procedure for determining competency of any person deemed to be mentally disordered or otherwise incompetent and also provides for the appointment of a guardian. G.S. 33-9 empowers the clerk to remove a guardian or trustee appointed under the provisions of Chapter 33 and to appoint their successors. G.S. 36-9 authorizes and empowers the clerk of superior court to accept the resignation of a trustee or guardian and to appoint a successor.

These statutes confer upon the clerk of the superior court the jurisdiction to appoint and remove guardians and trustees appointed in lieu of guardians. See *In re Michal,* 273 N.C. 504, 160 S.E. 2d 495 (1968).

A patient in a mental institution has a right to treatment. G.S. 122-55.6. Under this statute, radical treatment, such as electroshock therapy, can be given a patient who has been adjudicated incompetent under Chapter 35 of the General Statutes only after the express and informed written consent of his guardian or trustee has been obtained.

It is the opinion of this Office that the clerk of superior court, upon proper application, is authorized to appoint a guardian for a person declared incompetent under the provisions of Chapter 35 of the General Statutes whether or not such person has an estate. To hold otherwise could deprive a patient of his right to treatment expressly provided for in G.S. 122-55.6.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

10 February 1975

Subject:	Taxation; Sales and Use Taxes; Local Government Sales and Use Tax Act; Distribution of Proceeds; Taxation Districts; G.S. 105-472
Requested by:	Mr. Fred P. Parker, Jr. Wayne County Attorney
Question:	Where a county elects to have local government sales and use tax proceeds distributed on the basis of population, are taxing districts within the county, on behalf of which the county or any municipality levies and collects ad valorem taxes, entitled to share in the distribution?
Conclusion:	No.

The local government sales and use tax is levied by Wayne County. The State is responsible for collection and distribution of the tax to the County and municipalities therein. G.S. 105-472. The Wayne County Board of Commissioners has the privilege of determining annually which of two methods of distribution shall apply and once chosen in the prescribed manner, the Secretary of Revenue must, "on a quarterly basis, distribute to each taxing county and to the municipalities therein the net proceeds of the tax collected in that county...." G.S. 105-472. Once the distribution is made, the State has no further administrative duty with respect to the application or further distribution of the tax proceeds, since the tax is a locally imposed tax. G.S. 105-466.

Of the two methods available for distribution, Wayne County has heretofore chosen to use the "ad valorem" basis. G.S. 105-472(2) provides in that regard that the tax proceeds "shall be divided between the county and the municipalities therein in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding such distribution." Further, "the amount of the ad valorem taxes levied by such county or municipality shall include

any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality." (Emphasis added.) Within the same numbered subparagraph the following appears: "Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality."

Wayne County is now considering adoption of the other method, which requires distribution "to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein...." G.S. 105-472(1). The question has arisen whether taxing districts on behalf of which the County or a municipality therein levies and collects ad valorem taxes are entitled to share in the distribution where the per capita distribution method is chosen.

We are persuaded that such taxing districts do not share in a distribution made under the "per capita" method. The population of a taxing district is not required to be added to county and municipal population, as its ad valorem taxes are required to be added to taxes levied by a taxing county and its municipalities under the "ad valorem" method. In fact no reference at all is made to taxing districts in G.S. 105-472(1). Further, the requirement that a taxing county or town "immediately share the proceeds" with a taxing district lies physically within subparagraph (2), not in the unnumbered paragraphs that have application to all of G.S. 105-472 generally. Therefore, we conclude that taxing districts on behalf of which counties, cities and towns levy and collect property taxes are entitled to share in distributions made only pursuant to G.S. 105-472(2) on the "ad valorem" basis, but not those made pursuant to G.S. 105-472(1) on the "per capita" basis.

Rufus L. Edmisten, Attorney General
Myron C. Banks,
Assistant Attorney General

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18 February 1975

Subject:	Mental Health; Education; Confidentiality of Patients' Records; Parental Access to Mental Health and Medical Records of their Children
Requested by:	Dr. Lenore Behar, Chief Child Mental Health Services Division of Mental Health Services N. C. Department of Human Resources
Question:	Does G.S. 115-179.1 require that access to medical and mental health records be granted to the parents of a child during an appeal from the actions or omissions of State or local authorities in placing, assigning, or denying entry of the child into an educational program?
Conclusion:	As a part of the appeal proceedings authorized by G.S. 115-179.1 it is required that the parents of the child involved be granted access to medical and mental health records which were considered in the child's educational program placement, assignment or denial thereof.

The 1973 General Assembly in its 1974 Session enacted Chapter 1293 which is designed to establish equal educational opportunities in the public schools. This legislation particularly noted the long-standing problem of affording educational opportunities to children with "special needs" – a term which encompasses virtually any mental or physical disability. The language of Chapter 1293 makes it very clear that the legislative purpose is to insure every child a full opportunity to reach his potential. The legislation requires the formulation of appropriate plans and programs to achieve this purpose, with the Department of Human Resources and the Department of Public Education being the responsible agencies for such formulation.

G.S. 115-179.1 (the codification of Sec. 10 of Chapter 1293) provides for the right of appeal by a "child, his parent or guardian" based upon (a) a denial of entry or continuance in a program, (b) placement in an inappropriate, unsuitable or inadequate program, or (c) assignment to a special program of a child without a special need. Review, to include a hearing, is authorized, and, as an incident thereto, the following action is mandated:

> "(e) The parent or guardian shall have access to any reports, records, clinical evaluations or other materials upon which the determination to be reviewed was wholly or partially based or which could reasonably have a bearing on the correctness of the determination..."

This language plainly covers records of medical treatment to include that received at State operated mental health facilities as well as treatment administered at community or locally operated facilities. However, apparently some concern has arisen as to possible conflict between this new statute and the privileged nature of these types of records.

Turning first to the basic question of the privilege, at common law no physician-patient privilege existed. See *State v. Bryant*, 5 N.C. App. 21 (1969). Thus, any such privilege is of statutory derivation; the two pertinent statutes of interest here would appear to be G.S. 122-8.1 (dealing with State operated mental facilities) and G.S. 8-53 (concerned with physicians and other medical personnel as a class.)

With regard to the privileged nature of State operated facilities, this Office has previously held that G.S.122-8.1 does not *preclude* the appropriate authority at a State operated facility from releasing records at his discretion. See 42 N.C.A.G. 291 (1973). Further, the privilege created by G.S. 8-53 is designed to protect the individual, not the physician or the facility involved. *Sims v. Charlotte Liberty Mutual Insurance Company*, 257 N.C. 32 (1962). Additionally, the specific language of G.S. 115-179.1, being the latest pronouncement on the subject by the General Assembly, must be regarded as controlling in the event that any conflict in statutory language is found between this new statute and the prior existing provisions.

As to the aspect of giving records access to the parent of a child as distinguished from giving records access to the child himself, the laws and courts of this State have traditionally held the parents responsible for insuring that their children receive a proper education. See G.S. 115-166 through G.S. 115-175; *Zande v. Zande*, 3 N.C. App. 149, 155-156 (1968).

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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18 February 1975

Subject:	Mental Health; Area Mental Health Program; Authority to Change the Name of an Area Mental Health Program
Requested by:	Mr. R. J. Bickel Assistant Director for Administration Division of Mental Health Services N. C. Department of Human Resources
Question:	Does the Commission for Mental Health Services or the Division of Mental Health Services have the authority to change the name "area mental health program" to some name which would include mental retardation, alcoholism, or other terminology of that nature?
Conclusion:	Neither the Commission for Mental Health Services nor the Division of Mental Health Services is authorized to change the name "area mental health program" in the fashion described.

Article 2C of Chapter 122 of the General Statutes provides for the establishment of area mental health programs. See G.S. 122-35.19. Therein, the terminology involved in the name prescribed is defined

(G.S. 122-35.18), provision is made for appointing area mental health boards who are responsible for the programs (G.S. 122-35.20), and the position of an area mental health director who is an employee of the program is created (G.S. 122-35.21). In addition, provision is made for appropriations to the Department of Human Resources for area mental health programs and for allocation of funds to these area mental health programs. See G.S. 122-35.23A. The language of these creating statutes makes it clear that change of the name of an area mental health program (other than by adding a description of the county, counties or area involved) would be contrary to legislative intent.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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18 February 1975

Subject:	Infants and Incompetents; Day-Care Plans; Applicability of 20% Tolerance to Day-Care Facilities Only; Maximum Number of Children in a Day-Care Plan.
Requested by:	Ms. Susan K. Smith, Licensing Analyst North Carolina State Day-Care Licensing Board
Question:	What is the maximum number of children for whom care can be provided at any one time, including after school, in a day-care plan?
Conclusion:	The maximum number of children for whom care can be provided at any one time, including after school, in a day-care plan is five.

Article 7 of Chapter 110 of the General Statutes provides that it shall be unlawful to operate a day-care facility without being licensed

under the provisions of that Article, and that it shall likewise be unlawful to operate a day-care plan without being registered with the Day-Care Licensing Board.

G.S. 110-86(3) defines "day-care facility" as "any day-care center or child-care arrangement that provides day care for more than five children and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit...."

G.S. 110-86(4) defines "day-care plan" as "any day-care program or child-care arrangement where any person provides day care for more than one child and less than six children and receives a payment, fee or grant for any of the children receiving care, wherever operated, and whether or not operated for profit."

G.S. 110-91(7) c. and d. provide for a 20% tolerance for absenteeism and withdrawals without notice, and a 20% tolerance for after-school children. These tolerances apply only to day-care facilities, however, and no comparable allowances are made for day-care plans. Thus, *the maximum number of children for whom care can be provided in a day-care plan at any one time, including after school, is five.* If more than five children will be present at any one time, then a license must be obtained for operation as a day-care facility.

Rufus L. Edmisten, Attorney General
Ann Reed
Assistant Attorney General

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18 February 1975

Subject: Taxation; Ad Valorem; Listing of Property for Taxation; G.S. 105-308, -309, -310

Requested by: Representative S. Thomas Rhodes
N. C. General Assembly

Question: Where an ad valorem tax abstract contains a preprinted description of property and a

preprinted value ascribed to the property by the taxing unit but disputed by the taxpayer, (1) is the taxpayer bound by that value when he signs the affirmation annexed to the abstract and (2) has he signed a false affirmation?

Conclusion: (1) No.
(2) No.

The facts are these: A county, following established procedures, forwards to a taxpayer a preprinted abstract, showing among other things the taxpayer's name and address, and a description of realty owned by the taxpayer, together with the value of the land as appraised by the county. The taxpayer denies that the value shown is correct, although agreeing that he owns the land.

G.S. 105-308 imposes a duty upon a taxpayer to list his property with the tax supervisor on an abstract, and prescribes criminal penalties for willful failure to do so. G.S. 105-309 sets out the information required of the taxpayer on the abstract. Neither that statute, nor any other, requires the taxpayer to list a value for his real property. In fact, the tax supervisor initially has the duty of valuing property (G.S. 105-296) and even if the taxpayer listed a value for his land, the tax supervisor could reject it. As the Supreme Court has observed, "the futility of allowing a taxpayer to fix the final value of his property for taxation is so apparent it decries discussion." *Albemarle Electric Membership Corp. v. Alexander* (1972), 282 N.C. 402.

The Machinery Act goes to some lengths to provide a taxpayer with a means of reviewing his property values. Prior to the first meeting of the county board of equalization and review, he has an opportunity to persuade the tax supervisor of an error in valuation and if persuaded, the supervisor may change the appraisal. G.S. 105-296(i). During the period in which the county board meets, the taxpayer may challenge the value before that board. G.S. 105-322. If unsuccessful there, he may secure a *de novo* hearing before the Property Tax Commission. G.S. 105-290. From there, he may obtain judicial review. G.S. 143-306, *et seq.*

Since a taxpayer is required by law to sign an affirmation annexed to his abstract (G.S. 105-310), the question has arisen whether by signing it he becomes bound by the value shown. We are persuaded that he does not, since he is not privileged to fix the value of his property in the first instance, and in the second is required by law to sign the abstract. Since he must sign the abstract, or violate the law, and assuming that he does sign it in order to escape the law's penalties, to reach the opposite conclusion would render the extensive provisions for review and appeal meaningless. In such case, one would have to conclude that the Legislature had devised a means of trapping unwary taxpayers into acceding to values they disagreed with, through threat of criminal sanctions if they failed to sign the abstract. Both faith in the system of government in North Carolina, and practical experience in the operation of the Machinery Act lend great support to our conclusion that a taxpayer who signs an abstract is not bound by a value appearing thereon which has been found by the tax supervisor but with which the taxpayer disagrees.

With respect to the same situation, the question has also arisen whether a taxpayer incurs any criminal penalty if he signs an abstract containing a value which he maintains is not a correct value. G.S. 105-310 provides:

> "There shall be annexed to the abstract on which the taxpayer's property is *listed* the following affirmation, which shall be signed by an individual qualified under the provisions of G.S. 105-311:
>
> > Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this listing, including any accompanying statements, inventories, schedules and other information, is true and complete....
>
> Any individual who willfully makes and subscribes *an abstract listing required by this Subchapter* which he does not believe to be true and correct as to every *material matter* shall be guilty of a misdemeanor...." (Emphasis added.)

It is our opinion that the statute is designed to insure that taxpayers

truthfully list their properties and provide the information required by law. As pointed out above, there is no requirement that a taxpayer *value* his property and in fact his attempt to do so on the abstract would be meaningless. Therefore the references to "listing", "information" and "material matter" in G.S. 105-310 can only have reference to those items on the abstract which he is required by law to furnish. He can, in our opinion, sign an abstract bearing a value with which he totally disagrees, without fear of punishment and with impugnity.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Assistant Attorney General

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18 February 1975

Subject: Juveniles; Detention; Youth Development; Detention Homes

Requested by: Mr. James P. Smith
Senior Administrative Assistant
North Carolina Department of Correction

Question: Is the Division of Youth Development authorized to accept custody of children committed to them by a court order, where such children are waiting to be tried as adult defendants and such children have not been adjudicated delinquent?

Conclusion: No.

Juveniles charged with felonies may, in the discretion of the district court, be bound over for trial as adults in the superior court. G.S. 7A-280. From time to time, district court judges assign these juveniles to the Division of Youth Development of the Department of Correction pending their trial. They do so apparently on the authority of the final paragraph of G.S. 7A-280, which provides that:

> "In case of transfer of any case to the superior court division under this section, the judge may order that the child be detained in a juvenile detention home or separate section of a local jail as provided by G.S. 110-24, pending trial in the superior court division."

There is a serious question, however, whether the facilities of the Division of Youth Development are the "juvenile detention homes" referred to in that section.

There are three different facilities to which youthful offenders may be sent: youth development schools, county detention homes, and regional detention homes. The authority for youth development schools is found in G.S. 134-2, which provides that certain designated schools shall be under the management of the State Department of Correction. These are the institutions which are presently being operated by the Division of Youth Development. County detention homes are authorized by G.S. 134-35 and G.S. 134-36. They are defined in the latter section to mean "one of the existing county-supported detention homes for juveniles or one which may be established by a county or other unit of local government in the future." Regional detention homes are also defined by G.S. 134-35 and G.S. 134-36. They are "State-supported and administered regional facilit(ies) providing detention care."

Conceivably, the "juvenile detention homes" noted in G.S. 7A-280 could refer to any of these three types of juvenile facilities. However, it is our opinion that they refer only to county and regional detention homes. We have formulated this opinion for the following reason.

The youth development schools authorized by G.S. 134-2 are governed by the rules set out following that section. In a number of respects, these rules are inconsistent with the assignment of accused felons bound over to the superior court. For example, G.S. 134-11 allows that "The schools, institutions, and agencies enumerated, and others that now exist or may be hereafter established, shall accept and train all *delinquent* children...." (Emphasis added.) Accused felons are not delinquents according to

the statutory definition of that term. See G.S. 7A-278. Further, G.S. 134-17 and G.S. 134-18 allow the Department of Correction to conditionally or finally release "any person in any school, institution or agency under its jurisdiction...." It is clear that this regulation, allowing conditional and final discharge, cannot conceivably be applied to one who has been bound over for trial and not yet been tried.

Other evidence that points to the distinction between youth development schools and regional and county detention homes is found in G.S. 134-35 and G.S. 108-79, G.S. 108-80, and G.S. 108-81. G.S. 134-35 governs "juvenile detention homes", and is the only place in the General Statutes other than in G.S. 7A-280 where that phrase is found. G.S. 134-35 and the sections in Chapter 108 clearly show that the phrase "juvenile detention home" is meant to apply to local detention facilities and not State-wide detention facilities. We nevertheless believe that district or superior court judges may assign those juveniles bound over for trial in superior court to regional detention homes. However, it is our opinion that it is inappropriate to assign these persons to schools operated by the Division of Youth Development.

Rufus L. Edmisten, Attorney General
Alan S. Hirsch
Associate Attorney

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18 February 1975

Subject: Counties; Commissioners; Vacancies Occurring on the Board; Political Affiliation of an Appointee

Requested by: Mr. James R. Sugg
Attorney at Law
Chairman, North Carolina Democratic Party

Question: Upon the occurrence of a vacancy on a county board of commissioners, must the

remaining members of the board appoint an individual of the same political party from which the member being replaced ran for office, if such member changed his political affiliation after his nomination and election?

Conclusion: Yes. The political affiliation of the member being replaced at the time of his nomination and election is controlling.

G.S. 153A-27 controls the filling of "Vacancies on the board of commissioners". In the first paragraph of G.S. 153A-27 it is stated: "If a vacancy occurs on the board of commissioners, the remaining members of the board shall appoint a qualified person to fill the vacancy."

The third paragraph of G.S. 153A-27 states the qualifications necessary for an individual to be appointed. It states, in part, "To be eligible for appointment to fill a vacancy, a person must (i) be a member of the same political party as the member being replaced, if that member was elected as the nominee of a political party,...."

It would appear from the above that the Legislature was clear in intending that the controlling political affiliation of the individual being replaced be that of the one he held at the time he was nominated and elected. In the case at hand the individual resigning from the board was nominated and elected as a Republican. After his election he changed his registration to that of "Independent".

Nowhere in Chapter 153A of our General Statutes can any conclusion be drawn that the affiliation at the time of resignation is controlling. The legislative intent appears clearly as indicated in G.S. 153A-27, to-wit, to be eligible for appointment to fill the vacancy a person must be a member of the same political party as the member being replaced if that member was elected as the nominee of a political party.

Although the person causing the vacancy is not now a member of any political party, the statute contemplates the appointment of a person who is a member of the party which the vacating member

belonged to at the time of his election.

Rufus L. Edmisten, Attorney General
Howard A. Kramer
Deputy Attorney General for
Legal Affairs

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18 February 1975

Subject: Social Services; State's Supervisory Responsibilities and Powers over County Departments of Social Services with Respect to Administration of Public Assistance Programs; G.S. 108-23; G.S. 108-52(c) and (d); §402(a) (3), Title IV-A, Social Security Act; §1902(a)(5), Title XIX, Social Security Act

Requested by: Dr. Renee P. Hill, Director
Division of Social Services

Question: What are the State's supervisory responsibilities and powers over county departments of social services with respect to the administration of programs of public assistance?

Conclusion: The State of North Carolina, through the Department of Human Resources and the Division of Social Services, is mandated both by federal and State law to supervise the administration of the programs of public assistance by the county departments of social services and in those instances of undue delay in and inefficient payment of grants to recipients or when it is determined that payments to recipients are jeopardized, the State may impose specific fiscal sanctions upon the counties pursuant to G.S. 108-52(c) and (d).

The State of North Carolina participates in several federal grant-in-aid programs of public welfare which are to be "administered by the county departments of social services under the rules and regulations adopted by the Social Services Commission and *under the supervision of the Department of Human Resources.*" G.S. 108-23 (emphasis supplied). In addition, there are several State-county programs of public assistance which are also to be administered by the county departments of social services under rules and regulations adopted by the Social Services Commission and under the supervision of the Department of Human Resources. G.S. 108-23.

With respect to the federal grant-in-aid programs in which North Carolina participates, there are the parallel mandates of the Social Security Act that the State plan must "either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan." See §402(a) (3), Title IV-A and §1902(a) (5), Title XIX of the Social Security Act. Thus, the supervisory responsibilities of the State with respect to both the federal grant-in-aid programs for public assistance and the State-county programs for public assistance are clearly enunciated in both federal and State law.

Furthermore, by electing to participate in the federal programs the State is bound by not only all the provisions of the Social Security Act pertaining to those programs but also to all the federal regulations promulgated thereunder by the Department of Health, Education and Welfare. Therefore, in exercising its supervisory responsibilities respecting these programs, the State must insure compliance with applicable federal law and regulations. This is accomplished by means of the publication of the rules and regulations adopted by the Social Services Commission in manual form which are then transmitted (with updates) to all the county departments of social services. Moreover, under State law the Social Services Commission is also directed to adopt rules and regulations for the administration of the State-county programs of public assistance which again are contained in the aforementioned manuals. The county departments of social services are mandated to administer these programs of public assistance in accordance with the State manuals. G.S. 108-23.

The means by which the State can effectively supervise the administration of the welfare programs at the county level has been the subject of much controversy in recent years. The contravention by a county department of social services of a provision of the State manual embodying a federal regulation may jeopardize the receipt of matching federal funds for a program of public assistance. Furthermore, disregard of the Commission's rules and regulations constitutes an assault on the statutory power and responsibility of the State to oversee the operation of the social welfare programs in North Carolina. Accordingly, it is important to note the fiscal sanctions which the State may impose upon the counties in certain circumstances. G.S. 108-52(c) and (d) provide:

> "(c) When the Secretary finds that the disbursement of funds by a county to qualified recipients is being unduly delayed, or that payments to recipients are jeopardized, he may require that grants be promptly paid as a condition for the allotment or transmission of State moneys to the county. State moneys may be withheld until the Secretary is satisfied that the county is paying the grants promptly.
>
> (d) When the Department of Human Resources finds it to be in the public interest to require more adequate protection of funds collected in the county for disbursement to recipients, or the more prompt, efficient and certain payment of grants to recipients, the Secretary may demand and require that the funds raised by taxation in any county be transmitted to the State Treasurer. The Secretary shall, in such cases, give notice to the board of county commissioners and to the county officials having such funds in their custody. The board of county commissioners and responsible officials shall immediately transfer all such funds to the State Treasurer for disbursement under rules and regulations established by the Department of Human Resources."

Obviously, the State should be loathe to utilize these drastic measures in the absence of an emerging pattern of disrespect for State rules and regulations.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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24 February 1975

Subject: Mental Health; Involuntary Commitment; Requirement for Examination and Report by a Qualified Physician in Involuntary Commitment Proceedings

Requested by: Dr. William Thomas
Chief, Adult Services
Division of Mental Health Services
N. C. Department of Human Resources

Questions: With regard to the provisions of G.S. 122-58.4 and G.S. 122-58.6 which require examination and findings by a qualified physician in an involuntary comitment proceeding:

(a) Can a physician's assistant legally fill out and sign the qualified physician examination and evaluation form with the oral approval of the physician?

(b) Must the physician whose signature appears on the evaluation form personally examine the prospective patient?

(c) Can a physician's assistant who is working under the supervision of a duly licensed medical practitioner examine the respondent and sign his own signature to the evaluation form without a physician having examined the patient?

(d) Can a non-medical mental health

professional staff member sign a physician examination and evaluation form for a physician?

(e) Can a non-medical mental health professional staff member examine the respondent and sign the physician's examination and evaluation form without a licensed medical practitioner seeing the patient?

Conclusions: In the situations described:

(a) While the physician's assistant may perform the physical act of filling out the examination and evaluation form under direction of the physician, the contents thereof must reflect the actual findings of the examining physician and the form must be personally signed by the physician.

(b) The physician whose signature appears upon the examination and evaluation form must personally examine the prospective patient.

(c) While a physician's assistant may assist the physician in conducting the examination of a respondent, the physician must be personally present and actually conducting the examination and only the physician is authorized to sign the examination and evaluation form.

(d) No other personnel are authorized to sign the physician examination and evaluation form for a physician.

(e) A non-medical mental health professional staff member cannot examine the prospective patient and sign the

evaluation form without a licensed medical practitioner seeing the patient.

Article 5A of Chapter 122 explicitly requires that all examinations of a respondent in an involuntary commitment proceeding and all written findings pursuant to such examinations be made by a "qualified physician." See G.S. 122-58.4 and G.S. 122-58.6. The term "qualified physician" is no longer defined in the General Statutes. However, clearly it should be interpreted as meaning doctors with unlimited licenses to practice medicine who have the professional qualifications to conduct the type of examinations required. See G.S. 90-18; also see 43 N.C.A.G. 175 (1973). Compare *Allen v. Hinson*, 12 N.C. App. 515 (1971).

The examination and written findings of a qualified physician form the foundation for the initial determination as to the release of the respondent or the appropriateness of proceeding further in the case. G.S. 122-58.4, G.S. 122-58.5 and G.S. 122-58.6. At a subsequent involuntary commitment hearing, the report of a qualified physician can be received in evidence. G.S. 122-58.7(e). Absent appropriate request for confrontation by a respondent, the report of the qualified physician may well be the determining factor behind a court's order of disposition. Similarly, if confrontation is demanded, the physician's testimony is quite likely to be the most important evidence received at the hearing.

In view of the importance of the qualified physician's examination and his report of findings, it must be concluded that the General Assembly contemplated that this examination and the execution of the report would be the personal responsibility of the qualified physician.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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26 February 1975

Subject: Taxation; Refund of Taxes; Statute of

Limitations; Extension of Time for Filing Return; G.S. 105-130.17; G.S. 105-266.

Requested by: Mr. W. B. Matthews
Director, Corporate Income & Franchise Tax Division
North Carolina Department of Revenue

Question: Is a claim for refund made within three years of a date to which time for filing a tax return was extended by the Secretary of Revenue timely made?

Conclusion: Yes.

The Department of Revenue is in receipt of a corporate taxpayer's demand for refund of income taxes paid under the following circumstances: The taxpayer's return for 1970 would have been due on 15 March 1971, but the company sought and received an extension of time for filing until 15 October 1971. The return was in fact timely filed on 26 September 1971. Subsequently, the company found that it failed to claim the correct rate of percentage depletion for 1970 and on 26 September 1974 sought to correct its error and obtain a refund based upon the correction. There is no dispute about the fact that an error was made or that its taxes were overpaid.

The refund is sought pursuant to G.S. 105-266 which provides in part that "no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received *within three years from the date set by the statute for the filing of the return* or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later." (Emphasis added.)

The question in this case is whether the claim is barred by the quoted provisions of G.S. 105-266; or, put differently, which filing date (15 March 1971 or 15 October 1971) was the date "set by the statute for the filing of the return"?

The quoted provisions are in the nature of a statute of limitations

(*Colonial Pipeline Company v. Clayton* (1969) 275 N.C. 215, 166 S.E. 2d 671) and a statute of limitations should not be applied to cases not clearly within its provisions; it should not be extended by construction. *Carolina Beach Fishing Pier, Inc., v. Town of Carolina Beach* (1968) 274 N.C. 362, 163 S.E. 2d 363. Bearing those principles in mind, we must examine the statute which sets the date for filing. G.S. 105-130.17(b) provides that except as otherwise provided in this section, the return of a corporation reporting on a calendar year basis shall be filed on or before the fifteenth day of March. However, G.S. 105-130.17(d) provides: "... whenever in his judgment good cause exists, the Secretary may allow further time for filing returns." Is the date to which the Secretary extends the time for filing a date "set by statute"?

Clearly, an extension of time is sufficient to preclude imposition of civil penalties for failure to file on time, since the statute so provides. G.S. 105-236(3). An extension of time would also preclude a successful prosecution for willful failure to file (a misdemeanor), with regard to a failure to file between the original due date and the date to which filing was extended, since the offense is committed only "with respect to the time or times required by law, or regulations issued pursuant thereto." G.S. 105-236(9). Clearly no prosecution against this taxpayer could have succeeded unless it had failed to file a return *after* 15 October 1971.

By the same token, it would appear that its claim for refund within three years after the extended filing date would be timely made. The Secretary of Revenue, absent statutory authority, could not extend the date. Conversely, any date extended pursuant to statute would appear to be a date "set by (i.e., pursuant to or on the authority of) the statute." To conclude otherwise would contradict the principles to which reference was made earlier. We therefore advise that the claim for refund, made within three years from the extended filing date, was timely made.

A previous opinion to the contrary dated 15 September 1971 is withdrawn.

Rufus L. Edmisten, Attorney General
Myron C. Banks,
Assistant Attorney General

26 February 1975

Subject:	Motor Vehicles; Drivers' Licenses; Financial Responsibility Act of 1953; Unsatisfied Judgments
Requested by:	Mr. Charles Hensley, Director Traffic Records Department of Motor Vehicles
Question:	Are the mandatory provisions of G.S. 20-279.13(a) applicable to unsatisfied judgments based on debt and/or conversion of a motor vehicle and damages resulting therefrom?
Conclusion:	No.

A judgment states that the plaintiff's claim for relief arose out of the ownership, maintenance and use of a described motor vehicle purchased by plaintiff; that defendant wrongfully caused a lien to be placed on the plaintiff's title certificate, wrongfully took possession of the motor vehicle, foreclosed the lien, and wrongfully obtained and transferred title to himself; and that the plaintiff shall have and recover a stated amount plus interest from the defendant. The same material facts are alleged in the plaintiff's complaint. The plaintiff's attorney has requested the Department of Motor Vehicles to suspend the defendant's driving privileges under the provisions of G.S. 20-279.13(a).

G.S. 20-279.1(3) and (11) define judgment and proof of financial responsibility in pertinent part as follows:

> "(3) 'Judgment': Any judgment which shall have become final...., upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle,...or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on an agreement of settlement for such damages."

"(11) 'Proof of financial responsibility': Proof of ability to respond in damages for liability, on account of accidents..., arising out of the ownership, maintenance or use of a motor vehicle,...because of injury to or destruction of property of others in any one accident."

The primary purpose of the Motor Vehicle Safety and Financial Responsibility Act of 1953 is to compensate the innocent victims of financially irresponsible motorists. *Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E. 2d 834 (1973). The act in effect requires a motorist to carry liability insurance or post security in the event of an accident. *McKinney v. Morrow*, 18 N.C. App 282, 196 S.E. 2d 585 (1973); G.S. 20-279.5.

The plaintiff's cause of action was essentially an action for debt arising out of the conversion of a motor vehicle. There was no injury to or destruction of plaintiff's property. The acts of the defendant complained of interfered with plaintiff's title and possession. Although the Financial Responsibility Act is a remedial statute and liberally construed, the defendant did not use the plaintiff's motor vehicle with express or implied permission nor was he in lawful possession thereof. See G.S. 20-279.21(b). The acts of the defendant complained of were remote and independent of the ownership, maintenance and use of a motor vehicle, and a judgment based thereon is not within the contemplation of the Financial Responsibility Act of 1953.

Rufus L. Edmisten, Attorney General
William B. Ray
Assistant Attorney General

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4 March 1975

Subject: Counties; Subdivision Ordinance

Requested by: Mr. James R. Prevatte, Jr.
County Attorney
Brunswick County

Questions:

(1) Does the platting and conveyance of one lot or tract out of a larger tract constitute the development of a subdivision within the meaning of G.S. 153A-335? If not, at what point does the platting and conveyance of additional lots or tracts out of the same larger tract constitute the development of a subdivision?

(2) If the County of Brunswick exercises its authority to enact a subdivision ordinance pursuant to Part 2, Article 18, Chapter 153A of the General Statutes, is it bound by the definition of "subdivision" as contained in G.S. 153A-335?

Conclusions:

(1) The platting and conveyance of one lot or tract out of a larger tract would not constitute the development of a subdivision unless the division involves the dedication of a new street or a change in existing streets. The platting and conveyance of an additional lot or tract out of the same larger tract would constitute the development of a subdivision unless the division is one of those specifically excluded by G.S. 153A-335 from the definition of "subdivision".

(2) Yes.

The determination of what constitutes a subdivision within the meaning of G.S. 153A-335 depends largely upon the intent of the owner at the time of division. This opinion is based upon the assumption that when the owner, in the situation hereinafter discussed, plats and conveys one lot or tract out of a larger tract, he intends to hold the remainder of the tract for some purpose other than sale or building development, either immediate or in the future.

G.S. 153A-335 defines "subdivision" as including all divisions of

a tract or parcel of land into two or more lots, building sites or other divisions for the purpose of sale or building development (whether immediate or future) and includes all divisions of land involving the dedication of a new street or a change in existing streets. Certain divisions of land are specifically excluded from the definition.

The platting and conveyance of a single lot or tract out of a larger tract would not constitute a division of a tract of land into "two or more" divisions "for the purpose of sale or business development." Therefore, such a division would not constitute the development of a subdivision unless the division also involves the dedication of a new street or a change in existing streets. All divisions of land involving the dedication of a new street or a change in existing streets constitute a subdivision within the meaning of G.S. 153A-335.

This Office is of the opinion that the platting of an additional lot or tract out of the same larger tract for the purpose of sale would constitute the development of a subdivision unless it falls within one of the divisions specifically excluded from the statutory definition. Otherwise, the owner of a tract of land intending to divide same into lots or tracts for the purpose of sale could circumvent the County's regulatory authority by simply platting and conveying one lot or tract at a time.

Inasmuch as the County's authority to regulate the subdivision of land is purely statutory, the County would be bound by the statutory definition of subdivision as contained in G.S. 153A-335.

Rufus L. Edmisten, Attorney General
Roy A. Giles, Jr.
Assistant Attorney General

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10 March 1975

Subject: Nurse Practice Act; Mechanical Act; G.S. 90-167; Controlled Substances Act; Applicability Thereof

Requested by: Mr. Wade Avant, Chief
Licensure and Certification Section
Division of Facility Services

Question: May a person, not licensed as a registered nurse or a licensed practical nurse, take a pill from a bottle, with the patient's name and the prescribed dosage on the label, and give the pill to a patient in a hospital facility if the medication has been prescribed by a licensed physician?

Conclusion: Yes.

The Nurse Practice Act (Article 9 of Chapter 90 of the General Statutes) provides for the licensing of registered nurses and licensed practical nurses. G.S. 90-158(3) defines the terms "Nursing", "Nursing by Registered Nurse", and "Nursing by Licensed Practical Nurse". "The practice of nursing by registered nurse means the performance for compensation of any act in...the administration of medications and treatment as prescribed by a licensed physician or dentist." (G.S. 90-158(3)a.). "The practice of practical nursing means the performance for compensation of selected acts.... Such performance requires a knowledge of and skill in simple nursing procedures, gained through prescribed preparation...." (G.S. 90-158(3)b.).

G.S. 90-167 proscribes the unlicensed practice of nursing. The last paragraph of G.S. 90-167 provides:

> "Nothing in this article shall be construed in any way to prohibit or limit the performance by any person of such duties as specified mechanical acts in the physical care of a patient when such care and activities do not require the knowledge and skill required of a registered nurse or licensed practical nurse, or when such care and activities are performed under orders or directions of a licensed physician, licensed dentist or registered nurse."

The question presented arises from the promulgation of rules and

regulations by the United States Department of Health, Education, and Welfare concerning intermediate care facilities. 45 C.F.R. 249.12(a)(8)(iv) provides that "All personnel administering medications must have completed a State-approved training program in medication administration." The training program, according to HEW, must include as a minimum the following topics: drug nomenclature and abbreviations, recognized abbreviations, product identification, measurement, storage, and common drug distribution systems, and role and responsibility of unlicensed personnel.

The North Carolina Controlled Substances Act (Article 5 of Chapter 90 of the General Statutes) provides in G.S. 90-101(c) that:

> "The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:
>
> (1) An agent, or an employee thereof, of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his business or employment;
>
> * * *
>
> (3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner;
>
> (4) Practitioners licensed in North Carolina by their respective licensing boards under Article 1, 2, 4, 6, 11 and 12 of this Chapter;
>
> * * *"

A practitioner is defined by G.S. 90-87(22)a. to include:

> "(22) ....
>
> a. A physician, dentist, veterinarian, scientific investigator, or other person licensed,

registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State."

G.S. 90-95 proscribes the manufacture, sale, delivery, or possession of a controlled substance except as authorized by this Article. G.S. 90-101(a) provides for registration of every person "who proposes to engage in the manufacture, distribution, dispensing of, or the conduct of research with any controlled substance"; G.S. 90-101(c), as set out above in part, provides exceptions to the registration requirement. "Dispensing" or "dispense" means, *inter alia*, "administering". (G.S. 90-87(8)). G.S. 90-87(1) states in part:

> "'Administer' means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:
>
> a. A practitioner (or, in his presence, by his authorized agent)...."

The clear intent of the last paragraph of G.S. 90-167 is to permit certain acts to be performed by unlicensed persons if the act is (1) a specified mechanical act, (2) performed in the physical care of a patient, and (3) does not require the knowledge and skill of a registered nurse or licensed practical nurse *or* is performed under orders or directions of a licensed physician, licensed dentist or registered nurse. Is the act of taking a pill from a bottle, with the patient's name and the prescribed dosage on the label, and giving the pill to a patient in a hospital facility by an unlicensed person permitted by this provision? It is the opinion of this Office that such act by an unlicensed person is permitted.

"The term (mechanical) is frequently defined as meaning employment in manual labor; engaged in manual labor; of, pertaining to, or concerned with manual labor." 57 C.J.S. *Mechanical*. From the description of the act and the training program proposed by HEW, it is evident that, although the administering of a pill to a patient requires some knowledge in order to limit the possibility

of error, the administering is essentially a manual act. For instance, although the proposed training program includes measurement, it is stated in the HEW Policy Memorandum No. 9 that "unlicensed personnel do not convert dosage in preparing drugs for administration." Such act would require a higher degree of knowledge and skill.

The second requirement, i.e., relating to the physical care of a patient, includes the act of administering of a pill. *Webster* defines "physical" to mean, *inter alia*, "concerned or preoccupied with the body and its needs". Nothing in the Nurse Practice Act suggests that a more restrictive definition is applicable here.

The third requirement states that either the act does not require the knowledge and skill of a registered nurse or licensed practical nurse or the act is performed under the orders or directions of a licensed physician, licensed dentist or registered nurse.

The practice of medicine by a licensed physician includes the diagnosis of, the treatment of, the operation on, the prescription for, and the administering to "any human ailment, physical or mental, or any physical injury to or deformity of another person." (G.S. 90-18). Therefore, if the administering of a pill is pursuant to an order of a licensed physician, the administering satisfies the third requirement and is lawful to be performed by an unlicensed person under the Nurse Practice Act. However, the Controlled Substances Act must also be construed and applied to determine the lawfulness of the act.

As set out above, the definition of a practitioner in the Controlled Substances Act includes a person otherwise permitted to dispense or administer a controlled substance "so long as such activity is within the normal course of professional practice or research in this State." (G.S. 90-87(22)). As previously established, the administering of a pill by a person not licensed as a registered nurse or a licensed practical nurse is permitted by the Nurse Practice Act. Furthermore, such practice in the administering of pills has been recognized and followed by physicians and hospitals in this State. Therefore, such a person is included within the definition of practitioners.

As set out above, G.S. 90-101(a) requires registration for dispensing of a controlled substance; "dispensing" includes administering (G.S. 90-87(8)); "administer" means direct application of a controlled substance by a practitioner (G.S. 90-87(1)); and "practitioner", as determined above, includes a person not licensed as a registered nurse or licensed practical nurse who administers a pill in the normal course of the professional practice of which he is a part. G.S. 90-101(c)(4), as set out above, lists the practitioners who are not required to register and who may lawfully possess a controlled substance. The type of practitioner described above would not qualify under (4); however, subdivision (3) also exempts from registration "a person in possession of any controlled substance pursuant to a lawful order of a practitioner." In this instance, the practitioner would be the licensed physician and the unlicensed person would be in possession of the controlled substance pursuant to the order of the licensed physician.

Therefore, in summary, it is the opinion of this Office that a person not licensed as a registered nurse or a licensed practical nurse may take a pill from a bottle, with the patient's name and the prescribed dosage on the label, and give the pill to a patient in a hospital facility if the medication has been prescribed by a licensed physician. Such act is not required to be performed by a registered nurse or licensed practical nurse under the Nurse Practice Act. Furthermore, such person may administer the pill, without being registered therefor, under the Controlled Substances Act.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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10 March 1975

Subject: Mental Health; Involuntary Commitment; Examination of Respondent; Release of Respondent Prior to Hearing Upon Change of His Condition

Requested by: Dr. Pedro Carreras
Assistant Director
John Umstead Hospital

Question: When a respondent has been examined by a qualified physician at a community or regional mental health facility within 24 hours of arrival (as required by G.S. 122-58.6) and has been found to be mentally ill or an inebriate and imminently dangerous to himself or others, may he be later released prior to his hearing in the district court if a qualified physician finds that his condition has improved so that he is no longer mentally ill or inebriate or imminently dangerous to himself or others?

Conclusion: In the situation described, the respondent may be released by the facility pending the district court hearing required by G.S. 122-58.7.

In the case of a respondent who has been taken to a community or regional mental health facility, G.S. 122-58.6(a) requires an examination by a qualified physician within 24 hours of his arrival. If the physician finds that the respondent is mentally ill or an inebriate and is imminently dangerous to himself or others, the respondent is held at the facility pending his commitment hearing in district court. If the physician finds "...that the respondent is not mentally ill or inebriate, or is not imminently dangerous to himself or others, he shall release the respondent pending the district court hearing...". While the situation described here is not directly addressed by G.S. 122-58.6(a), the underlying theme throughout the North Carolina commitment statutes is a recognition that the least restrictive mode of hospitalization and treatment which is appropriate will be utilized in each individual case. Thus, upon the pre-hearing finding by the qualified physician that the respondent is not mentally ill or an inebriate or that he is not imminently dangerous to himself or others–albeit the facts that this represents a changed finding–the individual may be released from the facility *pending his district court hearing*. Of course, the requirements of

G.S. 122-58.6(a) for notification of the clerk of the superior court of the county from which the respondent was sent, for transportation of the respondent, and for securing his presence at his hearing must be adhered to.

One matter which might lead to confusion as to the nature of the release is worthy of mention. G.S. 122-58.4(c) contains the following provision regarding the initial examination by a qualified physician:

> "If the physician finds that the respondent is not mentally ill or an inebriate, or is not imminently dangerous to himself or others, the law enforcement officer shall release him, and the proceedings shall be terminated."

Superficially, this provision might appear to conflict with the language of G.S. 122-58.6(a) which authorizes only the release of a respondent pending his commitment hearing. Obviously, however, the Legislature intended that the unconditional release of the respondent and termination of the proceedings would be authorized in a situation where the first examination by a qualified physician reveals the respondent does not meet the criteria for involuntary commitment–even where the initial examination is in a community health center. Conversely, though, where the first examination is adverse to the respondent but a later examination is favorable, it appears clear that the Legislature intended that the factual question which has then been presented must be resolved by the district court. This rationale is compatible with the conclusion arrived at in this opinion.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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10 March 1975

Subject: Mental Health; Area Mental Health Boards; Out-of-State Hospitals; Contracts

Requested by: Mr. R. J. Bickel, Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Questions: (1) May an area mental health board enter into a contract with a hospital in another state to provide in-patient services to North Carolina citizens?

(2) May a staff member of an area mental health center make calls on North Carolina citizens hospitalized in another state?

Conclusions: (1) An area mental health board may not enter into a contract with a hospital in another state to provide in-patient services for North Carolina citizens.

(2) A staff member of an area mental health center may not make calls on North Carolina citizens hospitalized in another state as a representative of the area mental health center.

The Department of Human Resources has jurisdiction over joint State and community-sponsored mental health clinics. G.S. 122-1. The Commission for Mental Health Services designates the regions for the State hospitals established for the admission of mentally disordered persons of the State and is authorized to change such regions when necessary. G.S. 122-4. Various provisions of Chapter 122 concern the admission of patients to State mental health facilities within the State. G.S.122-56.2(b) designates the appropriate place for voluntary admissions of mental patients in the State while G.S. 122-58.8(b) prescribes the authorized places for involuntary commitment of this type of individual. Both clearly contemplate the use of facilities located in North Carolina. Chapter 122, Article 2C of the General Statutes provides for the establishment of area mental health programs and the programs so established are joint undertakings of the counties in the designated area and the

Department of Human Resources. See G.S. 122-35.19. The area mental health board is responsible for reviewing and evaluating the needs and programs in mental health and for developing jointly with the Department of Human Resources an annual plan for the effective development, use and control of State and local facilities and resources in a comprehensive program of mental health services for residents of the area. G.S. 122-35.20(e).

Article 3, Parts 2 and 3 of Chapter 122, specifies certain patient rights, the curtailment of which requires a detailed reason in writing on the patient's record.

The legislative intent, as gathered from the various provisions of Chapter 122, is that North Carolina citizens be treated in North Carolina in treatment facilities under the auspices of the Department of Human Resources. If it were otherwise, grave questions would arise with respect to enforcement of laws of this State beyond its territorial limits, including but not limited to the enforcement of patients' rights. Hence, the conclusion as to Question (1).

As to Question No. 2, no statute has been found which would authorize a staff member of an area mental health center in his official capacity to call upon a North Carolina resident hospitalized in another state; however, this should not be construed so as to prohibit such member individually from calling upon a North Carolina resident voluntarily hospitalized in another state provided that such member complies with the laws of that state in so doing.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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10 March 1975

Subject: Criminal Law and Procedure; Forfeiture of Motor Vehicle; Possession of Controlled Substance

Requested by: Honorable Robert Rouse
Judge of Superior Court

Question: Does the owner of a motor vehicle seized under the provisions of G.S. 90-112 from a legal possessor of such motor vehicle have standing to intervene and petition for return of his vehicle as he does under the provisions of G.S. 18A-21?

Conclusion: No.

G.S. 90-112, in relevant part, reads:

"§ 90-112. *Forfeitures.*–(a) The following shall be subject to forfeiture:

* * *

(4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2), except that

a. No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this Article unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this Article;

b. No conveyance shall be forfeited under the provisions of this section by reason of any act or omission, committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;

c. No conveyance shall be forfeited unless the violation involved is a felony under this Article.

d. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who had no knowledge of or consented to the act or omission...."

No provision is made in G.S. 90-112 as is made in G.S. 18A-21 for return of a vehicle to an owner who can prove that his vehicle was used in violation of the statute "without his knowledge and consent".

Research indicates that it was not intended that a forfeiture without recourse occur where a vehicle is used in violation of the North Carolina Controlled Substances Act (Article 5 of Chapter 90 of the General Statutes of North Carolina) without the knowledge and consent of the owner. The forfeiture provisions of this act however do not provide for recovery by the owner in such cases.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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14 March 1975

Subject: State Departments, Institutions and Agencies; University of North Carolina, Chapel Hill; Budget; Payroll Deductions

Requested by: Mr. Claiborne S. Jones
Vice Chancellor
The University of North Carolina
at Chapel Hill

Question: May employee contributions to charitable organizations be deducted from the

University payroll at the request of the employee for payment to such charitable organization by the University?

Conclusion: No.

G.S. 147-62 provides:

"§147-62. *Assignments of claims against State.* - All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of any such claim or any part or share thereof shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein: Provided that this section shall not apply to assignments made in favor of hospitals, building and loan associations, and life insurance companies: Provided, further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of any credit union organized pursuant to Chapter 54 of the North Carolina General Statutes having a membership at least one half of whom are employed by the State or its institutions, departments, bureaus, agencies or commissions, may authorize, in writing, the periodic deduction from his salary or wages as such employee of a designated lump sum, which shall be paid to such credit unions when said salaries or wages are payable, for deposit to such accounts, purchase of such shares or payment of such obligations as the employee and the credit union may agree: Provided, further, that this section shall not apply to assignments made by members of the State Highway Patrol, agents of the

State Bureau of Investigation, motor vehicle inspectors of the Revenue Department, and State prison guards, to the commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund in payment of dues due by such persons to such fund."

The apparent intent of G.S. 147-62 is to prohibit or declare void all assignments of claims upon the State or any of its agencies which are not expressly provided for as an exception in the statute and has been so interpreted for a number of years.

It is the opinion of this Office that legislative action would be required to permit payroll deductions for employee contributions for purposes other than those expressly provided for in this Section of the statute.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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14 March 1975

Subject: State Departments, Institutions and Agencies; Department of Natural and Economic Resources; Fishing Regulations

Requested by: Mr. L. Leo Tilley
Assistant Director
Division of Marine Fisheries
Department of Natural and Economic Resources

Question: Is Regulation F-1(c), North Carolina Fisheries Regulations for Coastal Waters, 1975, applicable to submerged lands which have been leased, deeded, or granted to individuals?

Conclusion: Yes.

F-1(c), North Carolina Fisheries Regulations for Coastal Waters, 1975, provides:

> "Clams shall not be taken by the use of hydraulic dredge except by special permit and in such areas and at such times as the Secretary shall designate based on prudent management of fisheries resources."

According to officials and personnel in the Department of Natural and Economic Resources, Division of Marine Fisheries, it has been established that the use of hydraulic clam dredges may have adverse effects on marine and estuarine resources in areas surrounding the area in which they are operated, and that they may have adverse effects on transient marine and estuarine resources in the area in which they are used and in adjacent areas. For example, the turbidity associated with the use of a hydraulic clam dredge may destroy oysters in surrounding areas; the use of hydraulic dredges may cause the suspension of coliform bacteria, toxic wastes, and other harmful substances which will cause a lowering of water quality in adjacent areas and may cause an area to be closed to shellfishing due to increased pollution levels.

Regulation F-1(c) does not preclude the use of the leased, deeded, or granted bottoms for the harvest of shellfish but only regulates the method of harvest.

G.S. 113-131 states that "(t)he marine and estuarine...resources of the State belong to the people of the State as a whole. The Department...(is) charged with stewardship of these resources."

G.S. 113-182(a) states in pertinent part that "(t)he Marine Fisheries Commission is authorized to authorize, license, regulate, prohibit, prescribe, or restrict all forms of marine and estuarine resources in coastal fishing waters with respect to:

> (1) Time, place, character, or dimensions of any methods or equipment that may be employed in taking fish;"

G.S. 113-182(b) states in pertinent part that "(t)he Marine Fisheries Commission is authorized to authorize, regulate, prohibit, prescribe, or restrict and the Department is authorized to license:

> (1) The opening and closing of coastal fishing waters...whether entirely or only as to the...use of particular equipment...."

> "As between a citizen and the public, the citizen's private property rights must be subordinated to such reasonable regulation as the overriding public interest requires." *Walker v. Charlotte*, 276 N.C. 166, 171 SE 2d 431.

The Marine Fisheries Division has promulgated Regulation F-1(c) which is designed to protect the public health, safety, welfare and prosperity and the public interest in marine and estuarine resources which are owned by the people of the State as a whole. Such a regulation is specifically authorized by G.S. 113-182(a)(1) and (b)(1). In our opinion the regulation is authorized by statute; it is not unreasonable, arbitrary or capricious; its application to private property is reasonably related to the public health, safety, welfare and prosperity; and it does not amount to an unconstitutional exercise of the police power.

Rufus L. Edmisten, Attorney General
William A. Raney, Jr.
Associate Attorney

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14 March 1975

Subject: Health; Council on Sickle Cell Syndrome; Conflict of Interest; Employee of N. C. Division of Health Services Also Serving as Member of Council on Sickle Cell Syndrome

Requested by: Mr. Rodney C. Hobbs, Chief
Administrative Services

Division of Health Services
N. C. Department of Human Resources

Question: Would appointment of an employee of the Division of Health Services, N. C. Department of Human Resources who is working in the Sickle Cell Program to membership on the Council on Sickle Cell Syndrome be unauthorized on the basis of resulting in a conflict of interest?

Conclusion: Appointment of the employee described as a member of the Council on Sickle Cell Syndrome would not be unauthorized on the basis that it would result in a conflict of interest.

Part 18, Article 3, Chapter 143B of the General Statutes provides for the appointment of a Council on Sickle Cell Syndrome. This Council is appointed by the Governor and its function is "...to determine the needs and to make recommendations for legislative action with regard to sickle cell syndrome and related genetic disorders." G.S. 143B-188.

The work-scope of the Council within this designated area involves assessing the needs of the State, consulting and advising the Department of Human Resources, and recommending appropriate legislation to the Legislature. G.S. 143B-192. Significantly, G.S. 143B-189 suggests that due consideration should be given to appointing as members:

> "(2) Public health officials; federal, State and local officials from offices concerned with rehabilitation and social services..."

In view of the nature of the function of the Council--i.e., advisory--and the specific suggestive language regarding appointment of public health officials, it would not appear that the appointment contemplated could be condemned as resulting in a conflict of interest and thus violative of G.S. 14-234.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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19 March 1975

Subject: Mental Health; Involuntary Commitment; Patients; Discharge; Liability of Treatment Facility; Transportation

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services

Questions: (1) Where a district court orders a mental patient's release from a treatment facility upon finding that he is no longer dangerous to himself or others, who has the responsibility of returning the patient to his county of residence?

(2) May a treatment facility or regional hospital permit a patient, who has been discharged by a district court as no longer dangerous to himself or others, to remain at such facility temporarily pending return to the county of residence?

Conclusions: (1) Where a district court orders a mental patient's release from a treatment facility upon finding that he is no longer dangerous to himself or others, the county of residence has the responsibility of returning the patient.

(2) A treatment facility or regional hospital may permit a patient, who has been discharged by a district court as no longer dangerous to himself or others, to

remain overnight at such facility pending return to his county of residence.

(1) G.S. 122-58.14 specifically provides that in an involuntary commitment proceeding transportation to or from a regional hospital outside the county for any purpose is the responsibility of the county. Where a respondent in such proceeding is found to be mentally ill and imminently dangerous to himself or others, he may be committed to a mental health facility, public or private, designated or licensed by the Division of Mental Health Services. G.S. 122-58.8(a). Rehearings are governed by the same procedures as initial hearings. See G.S. 122-58.11.

Thus, where a respondent in a rehearing is discharged by the district court as being no longer dangerous to himself or others, both the cost and responsibility of returning the respondent to his county of residence falls upon the county.

As to Question (2), a patient unconditionally discharged by the court is free to leave the treatment facility immediately. Where such patient is neither dangerous to himself or others, but is still afflicted with mental illness needing treatment, he may apply for voluntary admission pursuant to the provisions of Chapter 122, Article 4, of the General Statutes. A common sense approach should be followed where circumstances are such that the patient cannot be returned immediately upon discharge, as where he is discharged too late in the afternoon to permit his return the same day and has no other place to go, he may be permitted to remain at the facility overnight. However, if permitted to remain, the patient should be advised that he must abide by the rules and regulations of the facility. In any event, the local authorities should be notified immediately so that transportation can be arranged by them at the earliest possible time.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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19 March 1975

Subject:	Mental Health; Involuntary Commitment and Voluntary Admission; Patients' Rights; Meaning of the Term "Institutionalized Patient"
Requested by:	Dr. Pedro Carreras Assistant Director John Umstead Hospital
Question:	What patients are included within the term "institutionalized patient" as used in G.S. 122-55.6?
Conclusion:	As used in G.S. 122-55.6, "institutionalized patient" means any inpatient who has been voluntarily admitted or involuntarily committed to a treatment facility in North Carolina.

The language of G.S. 122-55.6 which has caused this query is as follows:

> "Each institutionalized patient shall have the right to receive appropriate treatment for mental and physical ailments and for the prevention of illness or disability. Each patient within 30 days after admission shall have an individual written treatment or habilitation plan formulated by the treatment facility's mental health or mental retardation professionals. Each patient who has been institutionalized in a State hospital shall have, as soon as practical but not later than the time of discharge, an individualized written postinstitutionalization plan setting forth a program of recommended vocational counseling or outpatient care. A copy of such plan shall be furnished to the patient or his guardian and, with the consent of the patient, to his attorney and his next of kin."

This statute is a part of the so-called "patients' rights bill" which

was ratified in 1973 in order to insure basic human rights to patients in North Carolina treatment facilities. See G.S. 122-55.1. Throughout the statutes which contain provisions pertinent to patients' rights, the terminology "patient" is consistently used, although sometimes it is modified by the usage of the term "adult" or "minor". Thus, the majority of the provisions in the patients' rights bill contemplate assuring rights to both inpatients and outpatients.

However, this particular portion now in question, by its very language, contemplates an in-patient situation and must be so limited in interpretation. In passing, it should be noted that G.S. 122-55.5 also includes entitlement to each patient of "an individualized treatment or habilitation plan"; this provision is clearly applicable to all patients.

In the newly developing juridical area dealing with a "constitutional" right to treatment, some authorities distinguish between the right to treatment of a patient involuntarily committed *vis-a-vis* one voluntarily admitted. The present question does not require delving into that area of the law. What we are concerned with here is the extent of a *statutory* right granted by the General Assembly. The language utilized throughout the entire patients' rights bill clearly indicates that the rights specified were intended for both the voluntary and involuntary patients.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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27 March 1975

Subject: Parole; Parole Commission; Bond

Requested by: Mr. James E. Cline
Parole Commissioner

Question: May a parolee who is in custody by virtue of a warrant issued by the Parole

Commission pursuant to G.S. 148-61.1 be released on bond?

Conclusion: No.

The law governing release of an individual on bond is found in Chapter 15, Article 10 of the General Statutes. In essence, the statutes define bond as a procedure for effecting the release of an accused while he awaits his trial or the results of an appeal.

> "Any justice or judge of the General Court of Justice has power to fix and take bail for persons committed to prison *charged with crime* in all cases..." G.S. 15-103 (Emphasis added).

This Article will be superseded on July 1, 1975, by the new Criminal Procedure Act, G.S. 15A-531 through 15A-544. Like the present law, however, the revision provides for release of only those persons awaiting trial, G.S. 15A-533, - 534, and -535, and those who are "either awaiting sentence or (who have) filed an appeal...." G.S. 15A-536.

There is also specific statutory authority allowing the release on bond of persons arrested for violating their probation. G.S. 15-200. However, there is no statutory provision allowing bail for alleged parole violators, or for any other category of offenders. On the contrary, the applicable statute indicates that bond should not be granted to parole violators. G.S. 148-61.1(b) provides that:

> "The Parole Commission may, in its discretion, enter an order revoking a parole conditionally or for a temporary period of time. Upon issuing such order of conditional or temporary revocation, such parolee may be arrested without warrant by any peace officer or parole officer. After such conditional or temporary revocation of parole, the *parolee shall be held for a reasonable length of time* during which the Parole Commission shall determine whether or not the conditions of said parole have been violated...." (Emphasis added).

Clearly, the words "shall be held" do not allow for the issuance of bail. Therefore, it is our opinion that a parolee arrested by virtue of a warrant issued by the Parole Commission pursuant to G.S. 148-61.1 may not be released on bond.

Denial of bail does not violate the parolee's rights. There is no constitutional right to bail after detention for a parole violation. *People ex rel Calloway v. Skinner*, 33 N.Y. 2d 23, 347 N.Y.S. 2d 178, 300 N.E. 2d 716 (1973); *In re Whitney*, 421 F. 2d 337 (1st Cir., 1970). However, we would like to emphasize that a parolee may not be held indefinitely pending a hearing on whether the conditions of his parole have been violated. See G.S. 148-61.1(b) and *Morrissey v. Brewer*, 408 U.S. 471 (1972). He should be given a hearing as soon as reasonably practical.

Rufus L. Edmisten, Attorney General
Alan S. Hirsch
Associate Attorney General

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27 March 1975

Subject: Federal Disaster Relief Act of 1974; Grants to Individuals and Families; Public Purpose; Acceptance of Advance from Federal Government

Requested by: Mr. John J. Tolson, III, Secretary
Department of Military and Veterans Affairs

Questions: (1) May the State make cash grants of 25% of the cost to meet disaster-related necessary expenses or serious needs to individuals or families adversely affected by a major disaster?

(2) May the State accept an advance from the federal government to meet its share of the cost of the program?

Conclusions: (1) Yes.

(2) Yes.

Article V, Section 2(1) of the Constitution of North Carolina provides that "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." Our Supreme Court has held that "The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that the tax revenues may not be used for private individuals or corporations, *no matter how benevolent*." (Emphasis in original) *Foster v North Carolina Medical Care Commission*, 283 N. C. 110, 124-125, 195 S. E. 2d 517 (1973). In the above case, the Court concluded that "While the Act now before us provides for ownership of the acquired property by a public agency until the bonds issued to finance the contemplated construction are retired, the Act has no purpose separate and apart from the operation by and ultimate conveyance of the hospital facility to the lessee thereof (a private corporation)." (at 127) Therefore, the Court found the Act unconstitutional.

However, in *State Education Assistance Authority v Bank of Statesville*, 276 N. C. 576, 174 S. E. 2d 551 (1970), the Court considered the constitutionality of an Act which authorized the issuance of revenue bonds for the purpose of using the proceeds therefrom for making loans to meritorious students and stated that "Of course, it is expected that a student loan will inure to the private benefit of the person who obtains it. It is equally true that the education provided throughout our entire school system is intended to inure to the benefit of the individual who obtains it. However, the fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of 'a paramount public purpose'." (at 587 and 588) The "paramount public purpose" is the education of the people of the State.

Our courts have not addressed the constitutionality of direct assistance through cash grants to citizens of the State. Nevertheless, this State has an established public assistance program and the inherent responsibility of protecting the public health, welfare, and

safety. The North Carolina Civil Defense Act of 1971, G.S. 166-6(2) in particular, authorizes the Governor during the existence of a state of civil defense emergency "To sell, lend, lease, give, transfer, or deliver materials or perform services for civil defense purposes." "Civil defense purposes" includes "emergency welfare services (civilian war aid)...and other functions related to civilian protection." (G.S. 166-2(1)).

It is apparent that our Legislature has considered the protection and preservation of the public health, welfare, and safety in disaster situations to be a function of State government and a public purpose for which tax funds may be appropriated. Although the determination of what is a "public purpose" by the Legislature is not conclusive upon the courts, it is entitled to great weight.

Section 408 of the Act provides that the grants shall be for the purpose of meeting "disaster-related necessary expenses or serious needs of individuals or families." 24 C.F.R. 2205.48(b) (1) and (2) define "necessary expense" and "serious need" respectively. These definitions indicate that the purpose of the grant is to relieve an adverse condition which, if not alleviated, would result in extreme hardship, injury or loss to individuals or families in the State. Section 408 further provides that grants are only to be made where assistance under the other provisions of the Act or from other means is unable to meet such expenses and needs.

It, therefore, appears that the making of financial grants directly to disaster victims, like the more traditional forms of emergency relief (food, shelter, medical care, etc.), is designed to assist communities, where private resources are inadequate, in order to preserve life and order in the aftermath of a disaster. The appropriation of funds for this purpose would be a "public purpose" within the meaning of Article V, Section 2(1) of the Constitution of North Carolina.

Article V, Section 3(1)(e) provides that the General Assembly may contract a debt secured by a pledge of the faith and credit of the State without a vote of the people "to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor." G.S. 166-10(b) provides:

"(b) Whenever the federal government or any agency or officer thereof shall offer to the State or through the State to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant or loan, for the purposes of civil defense, the State, acting through the Governor, or such political subdivision, acting with the consent of the Governor and through its governing body, may accept such offer and upon such acceptance the Governor of the State or governing body of such political subdivision may authorize any officer of the State or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials, or funds on behalf of the State or such political subdivision, and subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer."

Therefore, the State may accept funds by way of gift, grant or loan subject to the terms of the offer for the purposes of civil defense. G.S. 143-34.2 requires that all applications and requests for federal funds and a statement of the purposes and conditions for receiving such funds be submitted to the Department of Administration and the Advisory Budget Commission.

Since G.S. 166-10(b) authorizes the State to accept funds subject to the terms of the offer and subsection (c) of Section 408 authorizes the President to promulgate regulations concerning the administration of the grants, the State may accept the funds upon the terms specified in the regulations.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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16 April 1975

Subject: Interest; Security Interest in Personal Property Under Revolving Charge Accounts

Requested by:	Mrs. Daphene L. Cantrell Assistant Clerk of Superior Court Mecklenburg County
Question:	Can a security interest be taken by the seller in a sale of personal property pursuant to a revolving charge account?
Conclusion:	G.S. 24-11(a) prohibits the taking of a security interest in personal property sold pursuant to a revolving charge account.

You have raised the question of whether a furniture store, selling items of merchandise under a revolving charge account, may retain a security interest in the merchandise sold. The furniture store in question has sold items of merchandise to a particular customer over a period of time. The amount of each sale has been added to the balance of an open account with the furniture store. The interest on this account is computed at the rate of one and one-half percent per month of the balance of the customer's account after deducting that month's payments and credits. The customer makes payments according to a specified schedule of minimum payments which are determined by the balance due. The customer has the privilege of paying the balance in full within 30 days of the date of the sale, in which event the customer will pay no finance charge. The furniture store has attempted to retain a security interest in the goods sold by virtue of a provision in their contract whereby they purportedly retain title to the merchandise until the account is paid. The furniture store has now alleged default and brought a small claim action to recover possession of the personal property as a secured party. The question is whether or not the furniture store is a secured party, or whether G.S. 24-11(a) prevents the furniture store from being a secured party in this situation.

G.S. 24-11 is as follows:

> "§24-11. *Certain revolving credit charges.* -
> (a) On the extension of credit under an open-end credit or similar plan (including revolving credit card plans, and revolving charge accounts, but excluding any loan made directly by a lender under a check loan,

check credit or other such plan) under which no service charge shall be imposed upon the consumer or creditor if the account is paid within twenty-five days from the billing date, there may be charged and collected interest, finance charges or other fees at a rate in the aggregate not to exceed one and one-half percent (1 1/2%) per month on the unpaid balance of the previous month. *Such extension of credit may not be secured by real or personal property or any other thing of value.* No person, firm or corporation may charge a discount or fee in excess of four percent (4%) of the principal amount of the accounts acquired from or through any vendor or others providing services who participate in such plan.

(b) On revolving credit loans (including check loans, check credit or other revolving credit plans whereby a bank, banking institution or other lending agency makes direct loans to a borrower), if agreed to in writing by the borrower, such lender may collect interest and service charges which shall not exceed one and one-fourth percent (1 1/4%) per month computed on the average balance outstanding of the previous month. Such loans, exclusive of interest, may not at any time exceed five thousand dollars ($5,000.00), and may not be secured by real or personal property or any other thing of value." (Emphasis supplied).

It seems clear that, in the absence of any other factors, paragraph (a) of G.S. 24-11 would apply to the transaction in question and would prohibit the taking of a security interest in the property. G.S. 24-11 by its own terms is not limited to loan transactions but applies to all forms of open-end credit, including revolving credit card plans and revolving charge accounts. In this respect, it may be noted that the furniture store in question has denominated this account as a "revolving charge plan".

G.S. 24-11 was enacted in its present form by the General Assembly in 1969. In 1971, the General Assembly enacted the Retail Installment Sales Act, Chapter 25A of the General Statutes. G.S. 25A-11 defines revolving charge account contracts for the

purposes of Chapter 25A, but specifically provides that the definition therein does not affect the meaning of the term "revolving charge account" appearing in G.S. 24-11(a). A revolving charge account contract under G.S. 25A-11 is a "consumer credit sale". G.S. 25A-23 limits the collateral in which a security interest may be taken by the seller in a consumer credit sale. It states that "the seller in a consumer credit sale may take a security interest only in the following property of the buyer to secure the debt arising from the sale: ...", and then lists those items of property in which a security interest may be taken. It does not appear to expressly allow the taking of a security interest in transactions in which but for this statute a vendor would not be allowed to take a security interest.

Construing the above provisions of the Retail Installment Sales Act, it may be argued that the General Assembly intended to allow sellers in revolving charge account sales to take a security interest in certain specified goods. Indeed, one writer has expressed the opinion that "by implication" Chapter 25A allows the taking of a security interest under circumstances in which the taking of a security interest would be prohibited under G.S. 24-11(a). Smith, *Consumer Protection in Credit*, 50 N. C. Law Review 767, 777, note 54 (1972). However, the Retail Installment Sales Act nowhere expressly allows the taking of a security interest in personal property in a revolving charge account transaction. While an argument may be made that taking of a security interest is permissible, such argument arises by implication and the statute on this point is not clear.

There is a general rule of statutory construction which holds that "where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage." 82 CJS, Statutes, Sec. 369, pp.

839-43. This principle is cited with approval in *National Food Stores v. North Carolina Board of Alcoholic Control*, 268 N. C. 624, 154 S.E. 2d 582 (1966); see also *Utilities Commission v. Electric Membership Corporation*, 3 N. C. App. 309, 164 S.E. 2d 889 (1968).

Thus, since G.S. 24-11(a) is specific and expressly prohibits the taking of a security interest under a revolving charge account contract, and the provisions of Chapter 25A of the General Statutes are not specific and are not clear on this subject, it would appear that the particular provisions of G.S. 24-11(a) would be controlling in this situation and would prohibit the taking of a security interest in the merchandise sold pursuant to a revolving charge account by the furniture store.

Rufus L. Edmisten, Attorney General
Donald A. Davis
Assistant Attorney General

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16 April 1975

Subject:	Mental Health; Community Mental Health Centers; Patients' Records; Privacy; Department of Human Resources
Requested by:	Mr. R. J. Bickel Assistant Director for Administration Division of Mental Health Services
Question:	May the Department of Human Resources require Community Mental Health Centers under its authority and supervision to report to it patients' names to be used for statistical purposes?
Conclusion:	No.

The Department of Human Resources presently requires the Community Mental Health Centers under its supervision to report the names of its patients to the central office of the Department

for "statistical" purposes. While the Department is authorized under G.S. 122-8.2 and G.S. 122-11.4 to assemble statistical data, there are a number of other provisions which forbid the disclosure of patients' names in the process.

To begin with, G.S. 122-8.2, the section which authorizes the collection of the data, specifically makes it

> "...unlawful for the Secretary of Human Resources or any person to disclose, release or divulge any information identifying a reported or reporting person under the provisions of this section.
>
> "Violation of this section constitutes a misdemeanor...."

In our opinion, this section clearly forbids the disclosure of patients' names both within and without the Department. Only those persons *directly* involved with a patient have need to know the patients' identity.

Even if it were not illegal to transmit patients' names under G.S. 122-8.2, the Community Mental Health Centers could not be *required* to send those names. G.S. 122-8 1(a) provides that:

> "No physician, psychiatrist or any other officer, agent or employee of any of the institutions or hospitals under the management, control and supervision of the Department of Human Resources shall be required to disclose any information, record, report, case history or memorandum which may have been acquired, made or compiled in attending or treating an inmate or patient of said institutions or hospitals in a professional character, and which information, records, reports, case histories and memorandums were necessary in order to prescribe for or to treat said inmate or patient or to do any act for him in a professional capacity unless a court of competent jurisdiction shall issue an order compelling such disclosure...."

See also G.S. 8-53, to the same effect.

Additional authority forbidding the disclosure of patients' names is found in G.S. 122-55.1, which provides that:

> "It is the policy of North Carolina to insure to each adult patient of a treatment facility basic human rights. These rights include the right to dignity, *privacy*, and humane care." (Emphasis added).

In our view, this requirement of privacy necessitates the protection of the patients' identity. This is consistent with the avowed policy of the State to encourage voluntary admissions to mental health programs and treatment facilities. G.S. 122-56.1. Violation of the confidentiality that a patient has a right to expect would discourage the use of mental health facilities and should not be permitted.

Finally, Community Mental Health Centers are eligible to receive federal funds pursuant to the National Mental Health Act and other portions of Chapter 6A of Title 42 of the United States Code. See also G.S. 122-35.1. While not specifically applicable to the Department of Human Resources, the Privacy Act of 1974 (Public Law 93-579, enacted December 31, 1974, partially codified at 5 U.S.C. §552a) provides in pertinent parts as follows:

> "SEC. 2.(a) The Congress finds that -
> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information;
>
> (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
>
> (4) the right to privacy is a personal and

fundamental right protected by the Consititution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

. . .

(b) CONDITIONS OF DISCLOSURE.–No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be–....

. . .

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is *not individually identifiable*;" (Emphasis added).

The Department of Human Resources has shown no overwhelming need for the disclosure of patients' names to be used "for statistical purposes". We feel that both the State law enunciated above and the strong federal policy embodied in the Privacy Act, coupled with the use of federal funds for these facilities, would act to prohibit the Department of Human Resources from such a practice.

Rufus L. Edmisten, Attorney General
Howard A. Kramer
Deputy Attorney General
for Legal Affairs
Alan Hirsch, Associate Attorney

16 April 1975

Subject: State Departments, Institutions, and Agencies; Department of Administration; Standard Specifications for Articles Purchased or Leased by the State; Administrative Procedure Act

Requested by: Mr. William T. Biggers
Department of Administration

Questions: (1) Is the Standardization Committee's authority to adopt, establish, and/or modify standard specifications for articles purchased or leased by the State subject to the rule-making provisions of the Administrative Procedure Act?

(2) Are the Standardization Committee's determinations whether particular products or leases meet the standards which they have specified for articles purchased or leased by the State subject to the hearing and judicial review portions of the Administrative Procedure Act?

Conclusions: (1) The authority of the Standardization Committee to review, adopt, establish, and/or modify standard specifications for articles purchased or leased by the State is subject to G.S. 150A, Article 2, the rule-making provisions of the Administrative Procedure Act.

(2) The Standardization Committee's determinations whether particular products or leases meet the standard specifications established by the Committee are subject to the administrative hearing and judicial review provisions of the Administrative Procedure Act, Articles 3 and 4 of G.S. 150A.

Section 150A-2 of the Administrative Procedure Act defines agency to include every agency, institution, board, commission and similar bodies of the State government of the State of North Carolina except such agencies as those in the legislative or judicial branches of the State government, local political subdivisions, and other local bodies. The Standardization Committee is appointed by the Governor and is integrated into the operation of the Department of Administration of the State government of North Carolina. Clearly the Standardization Committee is a State agency, as defined in the Administrative Procedure Act, G.S. 150A, and does not fall within any of the exceptions to that definition. The specifications adopted, established, and/or modified by the Standardization Committee are rules within the meaning of G.S. 150A-10. Each specification is a "standard or statement of general applicability that implements or describes law or policy." Nor do the specifications fall within any of the exceptions to the definition of rule. Since the standards govern inter-agency activities and relationships, they do not qualify as rules "concerning only the internal management of an agency and not affecting private rights or procedures available to the public" and are therefore not within the internal management exemption from the rule-making requirements. No other exclusion from the definition of rule in Article 2 of G.S. 150A is in any way applicable to the Standardization Committee's specifications for articles purchased or leased by the State.

In order for the specifications adopted, established, and/or modified by the Standardization Committee to be effective, the Standardization Committee must follow the requirement of the Administrative Procedure Act, G.S. 150A, and the requirements for filing of all rules with the Office of the Attorney General as provided in Article 2 of the Administrative Procedure Act.

The Standardization Committee's determinations whether particular products or leases meet the applicable specifications for purchases or leases by the State fall within the definition of contested cases in G.S. 150A-2(2). Such determinations are proceedings "wherein the legal rights, duties or privileges of specific parties are to be determined." A State agency may be a party for purposes of the Administrative Procedure Act. G.S. 150A-2 (5). The Standardization Committee is deciding the privilege or duty of a State agency to enter into a particular lease or purchase and the privilege of a private

party to sell or lease to the State. Article 3 of the Administrative Procedure Act requires that the party in a contested case be given an opportunity for a hearing which meets the requirements of that Article, unless some other statute conflicts with specific portions of the provisions in the Administrative Procedure Act for administrative hearing. Thus, the Standardization Committee must comply with all requirements for administrative hearings (contested cases) in Article 3 of the Administrative Procedure Act, G.S. 150A, in connection with its determinations whether particular products or leases meet the specifications adopted, established, and/or modified for such purchases or leases by the State. Unless some other statute provides an adequate procedure for judicial review of the final agency decision in a contested case, the Standardization Committee is subject to the provisions for judicial review of contested cases set out in Article 4 of the Administrative Procedure Act.

Rufus L. Edmisten, Attorney General
Howard A. Kramer
Deputy Attorney General
for Legal Affairs

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16 April 1975

Subject: Mental Health; Voluntary Admission; Liability for Medical Services Rendered to Mental Patients by General Hospitals

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Question: At what point in the processing of a voluntarily admitted patient does a State treatment facility become liable to a general hospital for charges for emergency treatment of physical ills or injuries of such patient?

Conclusion: The State treatment facility is not liable for charges for the emergency treatment described until after the patient has been accepted as a patient at the treatment facility by an evaluating physician or physicians.

It appears that it is not unusual for potential patients (either mentally ill or inebriate) to come to or be delivered to a State treatment facility while suffering from such a degree of physical illness or injuries as to warrant treatment at a general hospital. In these situations, the State treatment facilities have caused the individuals to be taken to general hospitals for treatment. The question has arisen as to the propriety of the State treatment facility honoring bills for such treatment rendered by the general hospitals.

G.S. 122-56.3 sets forth the procedures required for voluntary admissions to treatment facilities, as follows:

> "§122-56.3. *Procedure for voluntary admissions.*– Any person who believes himself to be in need of treatment for mental illness or inebriety may seek voluntary admission to a treatment facility by presenting himself for evaluation to the facility. No physician's statement is necessary, but a written application for evaluation or admission, signed by the person seeking admission, is required. The application shall acknowledge that the applicant may be held by the treatment facility for a period of 72 hours subsequent to any written request for release that he may make. At the time of application, the facility shall provide the applicant with the appropriate form for discharge. The application form shall be available at all times at all treatment facilities. However, no one shall be denied admission because application forms are not available. *Any person voluntarily seeking admission to a treatment facility must be examined and evaluated by a qualified physician of the facility within 24 hours of presenting himself for admission. The evaluation shall determine whether the person is in need of treatment for mental illness or inebriety,*

or further psychiatric evaluation by the facility. If the evaluating physician or physicians determine that the person is not in need of treatment or further evaluation by the facility, or that the person will not be benefitted by the treatment available, the person shall not be accepted as a patient." (Emphasis supplied)

Additionally, G.S. 122-55.6 describes a patient's right to treatment in the following language:

> "Each institutionalized patient shall have the right to receive appropriate treatment for mental and physical ailments and for the prevention of illness or disability."

In a recent opinion, the Attorney General has defined the term "institutionalized patient" to mean all inpatients who have been voluntarily admitted or involuntarily committed. See opinion of the Attorney General to Dr. Pedro Carreras, dated 19 March 1975.

It is apparent that the actual pecuniary responsibility of the treatment facility for treatment of this type of voluntary applicant comes about at the time of acceptance as an institutionalized patient at the facility. Thus, absent payment by the patient, the facility may be held liable for charges incurred as a result of treatment of an "institutionalized patient" who has been referred to the general hospital for medical treatment not available at the facility.

That is not to say that basic humanitarian principles do not require that steps be taken by the treatment facility to secure appropriate medical treatment for physical ills and injuries–these to include transporting the patient to a hospital where such is necessary in order to obtain the treatment. However, as we have noted in a prior opinion:

> "Ordinarily an express or implied contract is necessary to render one person liable for hospitalization charges of another. Any such contract must be construed in view of the language used in the agreement as well as in light of all the facts and circumstances involved

at the time it was executed. See *Bartron Clinic v. Kallemeyn*, 60 S.D. 598, 245 N.W. 393 (1932)."

Therefore, by acting as a Good Samaritan, the treatment facility does not automatically incur liability for charges made by a general hospital for emergency treatment of the individual prior to his being accepted as a patient by the treatment facility. Prior to his admission, the individual's status vis-a-vis the general hospital would appear to be the same as that of any other emergency patient received at the hospital.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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16 April 1975

Subject: Mental Health; Competency of Patients; Authority of Chief Medical Officer of Regional Mental Health Facility to Issue Certificate of Sanity

Requested by: Mr. John L. Pinnix
Special Counsel
Broughton Hospital

Question: May the chief medical officer of a regional mental health facility operated by North Carolina issue a certificate of sanity under North Carolina General Statute 35-5?

Conclusion: The chief medical officer of a regional mental health facility operated by North Carolina may issue a certificate of sanity under North Carolina General Statute 35-5.

As pertinent to this question, G.S. 35-5 states:

"Any person who has been declared of unsound mind and memory under §35-3, and for whom a guardian

has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory."

The basic problem arises from the use of the term "superintendent" in this statute (which has remained unchanged since 1953), since that term is no longer used at the regional mental health facilities.

A review of the history of our State mental hospitals (now referred to as regional mental health facilities) is both interesting and informative. Previously a Medical Superintendent, who was required to be a medical doctor licensed in North Carolina, was in charge of each of the State mental hospitals. See 1969 Session Laws, Chapter 1249, Section 2; also see 1963 Session Laws, Chapter 1166, Section 4. Subsequently, G.S. 122-25 was amended and the term "Superintendent" was deleted. Instead, provision was made for an administrator at each mental hospital (to act as chief executive officer with no requirement that he be a medical doctor), and a chief of medical services (a medical doctor licensed to practice medicine in North Carolina who exercised supervision and direction over all medical and clinical facilities). See 1973 Session Laws (1973 Session), Chapter 673, Section 2, effective May 22, 1973. However, the Executive Organization Act of 1973, effective July 1, 1973, repealed G.S. 122-25 in its entirety. See 1973 Session Laws (1973 Session), Chapter 476, Section 133(b).

At the present time, the term "Director" designates the chief executive officer of each of the regional mental health facilities. If the individual occupying this position is a medical doctor who is licensed in North Carolina, in addition to exercising supervision over all administrative matters, he also is the supervisor over all medical and clinical services. However, at regional mental health facilities where the Director is not a medical doctor licensed in North Carolina, a "Director of Clinical Services" who has that qualification is in charge of all medical and clinical services.

This Office was recently confronted with a similar problem of interpreting G.S. 35-3–the sister statute of G.S. 35-5 dealing with

"the certificate of the superintendent...declaring such person to be of insane mind and memory..." There, we held that the "Clinical Director" of a local mental health clinic equated to a "Superintendent" for purposes of G.S. 35-3. See 44 N.C.A.G. 190 (1974).

The same logic utilized there mandates the conclusion that the chief medical officer of a North Carolina regional mental health facility–either the "Director" or the "Director of Clinical Services", as the case may be–is authorized to execute a certificate of sanity as described in G.S. 35-5.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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16 April 1975

Subject: Public Officers and Employees; Conflict of Interest; North Carolina Mental Health Study Commission; Contract for Services of Member Thereof

Requested by: Honorable James E. Holshouser, Jr.
Governor

Question: Does the furnishing of services by the Department of Psychiatry, University of North Carolina School of Medicine, under its contract with the model area program of the North Carolina Department of Human Resources, constitute a conflict of interest where the person performing such services is both a member of the North Carolina Mental Health Study Commission and a member of the staff of the Department of Psychiatry, University of North Carolina School of Medicine?

Conclusion: No.

The North Carolina Mental Health Study Commission was established in 1973 to study and evaluate the existing system of delivery of mental health care for mental illness, mental retardation, alcoholism and related health problems. See 1973 Session Laws, First Session, which also provided for funding from existing capital improvement appropriations made to the Department of Mental Health.

One member appointed to the Commission is a full-time faculty member of the Department of Psychiatry, University of North Carolina School of Medicine, and also Director of its Community Psychiatry Division.

In implementing various Commission recommendations, the Division of Mental Health Services of the Department of Human Resources, through its model area program, enters into contracts with the Department of Psychiatry of the University of North Carolina School of Medicine for the furnishing of consulting services by that particular member of the Mental Health Study Commission in the planning of and participation in model area program retreats and other activities. Payments under the terms of the contracts are made directly to the Department of Psychiatry and are used to augment the Department's budget. The Commission member receives no personal compensation whatsoever other than his salary as a full-time faculty member in the Department of Psychiatry.

Since there is no contract between the Mental Health Study Commission and the particular member of the Department of Psychiatry, it would appear that the conflict of interest statute (G.S. 14-234) is inapplicable. As a general rule, a public officer is prohibited from having an interest, either directly or indirectly, in any contract with the public body of which he is a member. This Office has previously held that a State university may not employ a member of its board of trustees, 40 N.C.A.G. 566, that a school board is not prohibited from contracting with a company which employs a member of the board, 40 N.C.A.G. 565, and that a county commissioner who is also an officer of the corporation may not enter into a contract with the board of commissioners for his corporation. 42 N.C.A.G. 9.

Although no case has been found dealing precisely with the situation presented, we are of the opinion that it is more nearly consistent with the situation wherein a member of a board is employed by a corporation contracting with the board.

The contract is between the Division of Mental Health Services and the Department of Psychiatry of the North Carolina School of Medicine; the particular member receives no compensation other than his regular salary for activities under the contract between the Department of Psychiatry and the Division of Mental Health Services; and the member is not contracting either with the Commission, the Division of Mental Health Services or the School of Medicine for these activities; thus, the foregoing conclusion.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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16 April 1975

Subject: Mental Health; Corrections, Involuntary Commitment of Convicts; Impermissibility of Administrative Transfer of Convict from Corrections System to Mental Health Services Forensic Unit

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Question: Can an inmate in the corrections system be transferred to the forensic unit of the Division of Mental Health Services administratively rather than through the involuntary commitment procedures?

Conclusion: No.

G.S. 122-85 deals with the subject of mentally ill criminals and subsection (a) thereof contains the following significant language:

> "A convict who becomes mentally ill and imminently dangerous to himself or others after commitment to any penal institution in the State shall be processed in accordance with Article 5A of this Chapter, as modified by this section, except when the provisions of Article 5A are manifestly inappropriate."

The remainder of this Section of the General Statutes sets forth provisions uniquely designed to fulfill the requirements of Article 5A but tailored to accommodate the fact that the respondent is a convict in the corrections system.

G.S. 122-58.1 sets forth the specific intent of the legislators that any "commitment will be accomplished under conditions that protect the dignity and *constitutional rights* of the person;..." (Emphasis supplied) Examined in the light of this language, the Article 5A language relative to "manifestly inappropriate" provisions clearly was intended to pertain to minor items which are, *per se*, inappropriate in view of the respondent's status as a convict. It certainly cannot be interpreted as permitting the excusal of the due process protective provisions of that Article so as to authorize an administrative transfer of a convict.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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16 April 1975

Subject: Social Services; Applicability of Insurance Law and Laws Regulating Hospital, Medical and Dental Service Corporations to Department Contract with Private Contractor for Latter to Provide Payment to Providers of Medical Services in Accordance with State Medical Assistance

Program at Predetermined Price; Chapters 57 and 58 of the General Statutes; Part 5, Article 2, Chapter 108 of the General Statutes

Requested by: Mr. David T. Flaherty
Secretary
Department of Human Resources

Question: Is either a private corporate contractor organized for profit or a proposed contract to be entered into between said contractor and the Department of Human Resources of the State of North Carolina, whereunder for a predetermined price the contractor undertakes to make payment to eligible providers of health care services rendered to persons entitled thereto under the State Medical Assistance Program, subject to regulation under the provisions of Chapter 57 or Chapter 58 of the General Statutes of North Carolina?

Conclusion: Such a contract, if authorized by the General Assembly, is not subject to regulation under Chapter 57 or Chapter 58 of the General Statutes of North Carolina and the private contractor is not subject to regulation thereunder.

G.S. 58-3 provides as follows:

> "*Contract of insurance.*--A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for, the destruction, loss, or injury of something in which the other party has an interest."

The Department of Human Resources proposes entering into a contractual arrangement with the Health Applications System

Division of Bergen Brunswig Data Service Company, a foreign corporation organized for profit, to administer the North Carolina Medical Assistance Program pursuant to Title XIX of the Social Security Act and pertinent federal regulations promulgated thereunder. The corporation is not licensed as an insurer or as a "hospital service corporation" pursuant to the provisions of Chapter 57 of the General Statutes in this State. Under the terms of the proposed contract the corporation promises (for a predetermined price for each eligible recipient) to pay all valid Medicaid claims submitted by providers of health services in accordance with the provisions of the State Medical Assistance Program and the federal Social Security Act. The purpose of the State Medical Assistance Plan is to provide health care services for persons who are financially unable to provide such services for themselves. Such persons are not entitled to receive benefits pursuant to any contract with the government and the statutory and regulatory provisions for such benefits do not constitute a contract of insurance.

It is also our opinion that if the State is authorized by the General Assembly to enter into the proposed contract, then the same should not be construed as subject to the provisions of Chapter 58 of the General Statutes by reason of the fact that the contract would otherwise be proscribed by the provisions of G.S. 58-254.4. Additionally, the provisions of Chapter 58 of the General Statutes should not be construed to apply to an authorized contract between the State and a private party wherein the latter undertakes to perform the State's obligations to its citizens, particularly as in this case where the contract is already subject to the supervision of a State agency.

By analogy, it is a known and firmly established maxim that General Statutes do not bind the sovereign unless expressly mentioned therein, *Yancey v. Highway Commission*, 222 N.C. 106, 22 S.E. 2d 256.

Chapter 57 of the General Statutes purports to regulate only corporations not organized for profit and the contracts of such corporations.

Since the contract proposed to be entered into is not subject to regulation under either Chapter 57 or Chapter 58 of the General

Statutes, the private contractor in this instance is also exempt from regulation under these statutes.

Rufus L. Edmisten, Attorney General
Isham B. Hudson, Jr.
Assistant Attorney General

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16 April 1975

Subject: Mental Health; Physicians and Doctors; Members of Medical Teams; Personal Liability to Patient for Negligence in Operation or Treatment

Requested by: Mr. Richard J. Bickel
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Questions: (1) Is a physician in charge at a North Carolina Mental health facility vulnerable to being held personally pecuniarily liable for an act of his medical team (i.e., extern, resident, physician assistant, nurse practitioner, etc.) which is the proximate cause of death or other harm to a patient:

(a) when the physician in charge is present?

(b) when the physician in charge is not present?

(2) Is a member of a medical team, (i.e., extern, resident, physician assistant, nurse practitioner, etc.) at a North Carolina mental health facility vulnerable to being held personally pecuniarily liable for his negligent act which is the proximate cause of death or other harm to a patient:

(a) when the physician in charge is present?

(b) when the physician in charge is not present?

Conclusions:

(1) The physician in charge, as described, is vulnerable to being held personally pecuniarily liable for an act of a member of his medical team which is the proximate cause of death or other harm to a patient:

(a) when he is present and exercising full power and control over the member's actions, and the member is acting under his directions;

(b) when he is not present but the member is acting specifically under his directions without deviation therefrom and without negligence on the part of the member.

(2) A member of a medical team, as described, is vulnerable to being held personally pecuniarily liable for negligent acts which are the proximate cause of death or harm to the patient:

(a) when the physician in charge is present if the member is not under the power and control of the physician in charge, or when the member is not acting under the direction of the physician in charge, or when the actions directed by the physician in charge and performed by the member are obviously negligent or dangerous;

(b) when the physician in charge is not present and the member is acting under directions of the physician in charge which are obviously negligent or dangerous, or when the member deviates from the actions directed by the physician in charge or performs them in a negligent manner.

A physician is not the insurer of the success of his treatment or operation on a patient. However, in order to absolve himself from liability from ill effects on the patient from his efforts, he must: (a) possess the requisite professional knowledge and skill, (b) exercise reasonable diligence in the application of that knowledge and skill in the individual patient's case, and (c) give the patient such attention as his case requires from time to time. *Galloway v. Lawrence*, 266 N.C. 245 (1966).

With regard to his assistants, the North Carolina Supreme Court has indicated that an individual physician who exercises due care is normally not liable for the negligence of nurses, attendants or interns who are not his employees. See *Davis v. Wilson*, 265 N.C. 139, 146 (1965). However, it has been held that a physician or surgeon who has full power and control over assistants during an operation so as to constitute them his agents is liable for their actions. *Jackson v. Joyner*, 236 N.C. 259 (1952).

In a situation where the physician is present, issues directions, stands by, and apparently approves of an assistant's actions, unless the treatment is obviously negligent or dangerous, the medical team member can assume that the treatment is proper under the circumstances; thus, such treatment, when the physician is present, becomes the treatment of the physician and not the team member. See *Byrd v. Hospital*, 202 N.C. 337, 343 (1932). The following language of the Supreme Court of North Carolina--though dealing with a physician-nurse situation--would seem to afford a succinct summary of the relationship between a physician in charge and a medical team member:

> "The great weight of authority, however, establishes the principle that nurses, in the discharge of their

duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient, unless, of course, such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order or performance of such direction." *Byrd v. Hospital, supra*, at p. 341.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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17 April 1975

Subject: Motor Vehicles; Stopping for Stopped School Bus; Multi-Lane Highway

Requested by: Honorable Paul M. Crumpler
District Judge - 4th Judicial District

Question: Are vehicles required to stop for stopped school buses on a four-lane highway which is separated by a center lane of some 12 feet with appropriate signs "DO NOT PASS IN CENTER LANE" and marked with pavement markings of double yellow lines on each side of the center lane?

Conclusion: Yes.

The exception set forth in G.S. 20-217 does not apply except on interstate or other controlled access highways divided by a physical barrier or if there is an intervening space between the travelled portion of the roadway.

G.S. 20-217 reads as follows:

"§ 20-217. *Motor vehicles to stop for properly marked and designated school buses in certain*

instances.– The driver of any vehicle upon approaching from any direction on the same street or highway any school bus (including privately owned buses transporting children), while such bus is displaying its mechanical stop signal, or is stopped for the purpose of receiving or discharging passengers, shall bring his vehicle to a full stop before passing or attempting to pass such bus, and shall remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The driver of a vehicle upon any interstate or other controlled-access highway need not stop upon meeting or passing a school bus which is in the roadway across the dividing space or physical barrier separating the roadways.

The provisions of this section are applicable only in the event the school bus bears upon the front and rear a plainly visible sign containing the words 'school bus' in letters not less than eight inches in height.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed two hundred dollars ($200.00) or imprisoned not to exceed 90 days."

The turn lane separating a dual lane, though marked with yellow lines and signed to prohibit passing in this lane, would not in our opinion constitute an intervening space and would not meet the requirement of a physical barrier. We interpret intervening space to mean a space not designed for vehicular traffic such as the grassed median on interstate highways.

It would appear that where problems arise on such highways, the Highway Division of the Department of Transportation should be requested to place signs informing the public that stopped school buses are not to be passed. Law enforcement officers would, in our opinion, be technically correct in issuing a citation. This would appear to be an appropriate violation if such was in good faith and the highway was not signed for the use of the warning ticket as provided in G.S. 20-183.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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21 April 1975

Subject: Prisons and Prisoners; Department of Correction; Appellate State Records

Requested by: Mr. James P. Smith
Senior Administrative Assistant
Department of Correction

Question: May persons committed to the custody of the Department of Correction under the provisions of G.S. 15-183 be treated in the same manner as sentenced prisoners whose convictions are not on appeal?

Conclusion: There are no constitutional or statutory reasons which preclude equal treatment.

Appellate safekeepers are persons who have been committed to the Department of Correction pursuant to G.S. 15-183, which provides that:

> "...Any person who shall appeal to the appellate division of the General Court of Justice, having been sentenced to a term of imprisonment for longer than 30 days...may be placed in the custody of the Secretary of Correction until such time as he may be released on bail or by other lawful means and pending the action of the appellate division."

Neither this statute nor any other specifies any particular type of confinement to which appellate safekeepers should be subject. The only other provisions that cast any light at all on the subject are G.S. 148-4, which grants the "Secretary of Correction control and custody of all prisoners serving sentence(s) in the State Prison

System," and G.S. 162-39, which requires the separation of *pretrial* safekeepers from the general prison population.

We can find no reason why appellate safekeepers are not "prisoners serving sentences in the State prison system" within the meaning of G.S. 148-4. The time they spend incarcerated counts toward their total sentence just as if no appeal were pending. In our view, the fact that they are awaiting the results of an appeal does not serve to differentiate them from other prisoners.

Appellate safekeepers have no constitutional right to be treated differently from other prisoners. See *Draper v. Rhay*, 315 F. 2d. 193 (9th Cir. 1963), cert. den. 375 U.S. 915, 11 L. Ed 2d 429, 84 S. Ct. 495; *Stilner v. Rhay*, 322 F. 2d 319 (9th Cir. 1963), cert. den. 376 U.S. 920, 11 L. Ed. 2d 615, 84 S. Ct. 678 (1964); *Leahy v. Estelle*, 371 F. Supp. 955 (N.D. Tex., 1974); *Proctor v. Clements*, Mem. Dec. No. 13, 828 (4th Cir., 1969); *Swaney v. Bounds*, Mem. Dec. C-42-G-71 (M.D.N.C., 1971). Therefore, we see nothing to prevent the Department of Correction from treating appellate safekeepers in the same manner as other prisoners. The law is not clear, however, and this opinion should not be construed as our authorization for the Department to change policy and begin mixing appellate safekeepers in with the prison population. Additional legislation clarifying the Department's authority under G.S. 15-183 is necessary before we can give our unqualified approval.

Rufus L. Edmisten, Attorney General
Alan S. Hirsch
Associate Attorney General

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22 April 1975

Subject: Juveniles; Juvenile Records; Improper for City-County Bureau of Identification of the City of Raleigh and County of Wake to Allow Public Inspection of Arrest Records of Juveniles; Article 23 of Chapter 7A of the General Statutes of North Carolina

Requested by:	Honorable James H. Pou Bailey Senior Resident Superior Court Judge Tenth Judicial District
Question:	Is it proper for the City-County Bureau of Identification operated jointly by the City of Raleigh and County of Wake to allow public inspection of juvenile arrest records?
Conclusion:	It is improper for the City-County Bureau of Identification to allow public inspection of juvenile arrest records.

The City-County Bureau of Identification operated jointly by the City of Raleigh and the County of Wake maintains and allows public access to the arrest records of juveniles. The propriety of making these arrest records available for public inspection has now come into question.

Article 23 of Chapter 7A of the General Statutes of North Carolina, while not squarely addressing the situation under discussion, embodies the legal philosophy of the State applicable to juveniles who are caught up within the judicial process. For example, G.S. 7A-277 provides:

> "The purpose of this Article is to provide procedures and resources for children within the juvenile jurisdiction of the district court which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults. These procedures are intended to provide a simple judicial process to provide such *protection*, *treatment*, *rehabilitation* or *correction* as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interest of the State....Therefore, this Article should be interpreted as remedial in its purposes to the end that any child subject to the procedures applicable to children in the district court will be benefitted through the exercise of the court's juvenile jurisdiction." (Emphasis supplied)

Additionally, and more significantly in the case at hand, G.S. 7A-287 provides, *inter alia*:

> "The court shall maintain a complete record of all juvenile cases to be known as the juvenile record, which *shall be withheld from public inspection* and may be examined only by order of the judge, except that the child, his parents, guardian, custodian and attorney, or other authorized representative of the child shall have a right to examine the child's juvenile record." (Emphasis supplied)

Certainly, if the court record of all juvenile cases is, by legislative mandate, withheld from public inspection except in limited circumstances, it seems glaringly apparent that the arrest records of juveniles should also be withheld from public view. Otherwise, in our opinion, the City-County Bureau of Identification may defeat the legislative intent of protecting the juvenile offender from irreparable and irrevocable stigmatization. Moreover, to allow public access to these arrest records when the final disposition of the case is unavailable by virtue of G.S. 7A-287 is patently repugnant to all notions of fundamental fairness.

In our judgment, therefore, it is improper for the City-County Bureau of Identification to permit the public to examine the arrest records of juveniles. Our opinion in 41 N.C.A.G. 407 (1971) is readily distinguishable as it did not specifically pertain to *juvenile* arrest records which, we believe, enjoy a special protection from public inspection.

Rufus L. Edmisten, Attorney General
William Woodward Webb,
Assistant Attorney General

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22 April 1975

Subject: Motor Vehicles; Trucks; Overweight Penalties

Requested by: Mr. J. F. Alexander
Commissioner of Motor Vehicles

Questions: (1) Are penalties provided in G.S. 20-118(5) and (12) mandatory?

(2) Does the Commissioner of Motor Vehicles or his agent have discretionary authority to reduce or abate penalties imposed by the above section?

(3) If it is determined that the weights upon which the assessment was based were incorrect or it can be substantiated that a departmental error was made in the issuance of the license plate, could adjustments be made in the original penalty which was imposed?

Conclusions: (1) Yes.

(2) No.

(3) Yes.

As to Conclusion 1, G.S. 20-118(5) and (12) read as follows:

> "(5) For each violation of subdivisions (3) or (4), or for each violation of the maximum axle-weight limits established by the Board of Transportation in connection with light-traffic roads, *the owner of the vehicle shall pay to the Department a penalty* for each pound of weight of (on) such axle in excess of the said maximum weight in accordance with the following schedule: for the first 1,000 pounds or any part thereof, two cents (2¢) per pound; for the next 1,000 pounds or any part thereof, three cents (3¢) per pound; and for each additional pound, five cents (5¢) per pound. Provided, however, the penalty shall not apply if the excess weight on any one axle does not exceed 1,000 pounds. Said 1,000 pounds shall

constitute a tolerance and no additional tolerance on axle weight shall be granted administratively or otherwise. In all cases of violation of the axle-weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted in subdivisions (3) and (4) including the 1,000-pound tolerance. The penalties herein provided shall constitute sole punishment for violation of this subdivision and violators thereof shall not be subject to criminal action. Provided, that when it is discovered that a vehicle is in violation of subdivisions (3) or (4), or is in violation of the maximum axle-weight limits established by the Board of Transportation in connection with light-traffic roads, the owner of the vehicle shall be permitted to shift without penalty the weight from one axle to another to comply with the axle limits set forth in this section in the following instances, provided, that the gross weight of the vehicle is within the legal limit:

a. In cases where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.

b. In cases where the vehicle has tandem axles and the weight exceeds the statutory limits, but does not exceed 40,000 pounds, for any two-axle combination or 60,000 pounds for any three-axle combination.

c. In cases where the axle weight does not exceed 15,500 pounds and the limit placed on the road or highway by the Board of Transportation is 13,000 pounds per axle. (Emphasis added)

* * *

(12) No vehicle shall be operated on any highway the weight of which, resting on the surface of such highway, exceeds 600 pounds upon any inch of tire roller or other support.

Any vehicle or combination of vehicle and load may exceed the gross weight limitations for the vehicle or vehicle and load hereinbefore set out in this section by not more than five per centum (5%), except that under no circumstances shall the total weight, including tolerance, exceed 73,280 pounds on the National System of Interstate and Defense Highways unless changed by federal law.*

For each violation of the gross weight limitations, including the five percent load the owner of the vehicle shall pay to the Department a penalty for each pound of weight of such vehicle or vehicle and load in excess of the weight limitations, including the five percent (5%), hereinbefore set out in this section for each vehicle or vehicle and load in accordance with the following schedule: For the first 2,000 pounds or any part thereof, one (1¢) per pound; for the next 3,000 pounds or any part thereof, two cents (2¢) per pound; for each pound in excess of 5,000 pounds five cents (5¢) per pound."

Subject to the permissible tolerance and right to shift, the penalties are mandatory.

As to Conclusion 2, the action of the General Assembly in specifying in G.S. 20-118 the tolerance allowable and the right to shift loads to avoid penalties clearly negates any authority of the Department of Motor Vehicles to waive or reduce any penalties provided therein.

As to Conclusion No. 3, certainly the Department has the authority to and should correct errors and make adjustments in assessments relative thereto. It would be advisable in such cases where assessments and penalties have been paid under protest with demand for refund made which requests have been denied that adjustments and refund payments be cleared through legal counsel prior to release as such could affect future suits for refund.

Rufus L. Edmisten, Attorney General
William W. Melvin,
Assistant Attorney General

*The "Federal-Aid Highway Amendment of 1974" which amended 23 USC 127 to permit states to raise weight limits in accordance with schedule up to maximum of 80,000 pounds removed this restriction. See AG Opinion, Billy Rose, 3 Feb. 1973.

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25 April 1975

Subject: State Departments, Institutions, and Agencies; North Carolina Arts Council; Visiting Artists' Program; Restricting Participation of Artists to Four Consecutive Years

Requested by: Mr. J. Alan Butler
Community Associate
North Carolina Arts Council

Questions: (1) Whether the North Carolina Arts Council may limit the number of consecutive years that artists may participate in the Visiting Artists' Program?

(2) Whether the implementation of a four-year limitation on the number of consecutive years that artists may participate in the Visiting Artists' Program would constitute an illegal and discriminatory restriction?

Conclusions: (1) The participation of artists in the Visiting Artists' Program may be restricted to four consecutive years, so long as this limitation is imposed on all artists. However, this restriction may not be established by the North Carolina Arts Council, which is only an advisory body. Rather, the four-year restriction should be approved and promulgated by the

Secretary of the Department of Cultural Resources in conjunction with the State Board of Education.

(2) A restriction on the number of consecutive years that artists may participate in the Visiting Artists' Program would be neither facially unconstitutional nor would it be discriminatory as a matter of law.

The Visiting Artists' Program, formerly known as the Artist-in-Residence Program, was initiated in 1971 as a joint effort between the North Carolina Arts Council and the North Carolina Department of Community Colleges. The main objective of the program is to promote the appreciation of the arts by sponsoring artists to serve as lecturers, instructors, and performers in the community colleges. At the present time, artists are employed for one-year terms with no restriction on the number of terms that they may serve.

The members of the Arts Council fear that the absence of a term limitation may tend to subvert one of the main purposes of the program, which is to expose students and citizens to a variety of art forms and ideas. In order to avoid this potential consequence, the Arts Council proposes to restrict the number of years that any individual artist may participate in the program to four consecutive years. After a lapse of one year, the artist would be eligible to serve for additional periods of from one to four years.

Section 143B-87 of the North Carolina General Statutes enumerates six duties and functions of the Arts Council. This legislation neither authorizes the Arts Council to formulate policies nor does it delegate to that body the power to implement regulations. Its statutory powers are limited to making recommendations to the Secretary of the Department of Cultural Resources. The authority to actually promulgate regulations on behalf of the Arts Council is vested in the Secretary of the Department of Cultural Resources. (G.S. 143B-50 - G.S. 143B-52)

As stated previously, the Visiting Artists' Program is cosponsored by the North Carolina Department of Community Colleges. The

working arrangement between the cosponsoring agencies has not been clearly outlined. However, the existing correspondence between the two agencies implies a mutual understanding that the implementation of regulations affecting the Visiting Artists' Program should be approved by the governing bodies of both agencies. Thus, the establishment of the proposed four-year restriction should receive the concurrent approvals of the Secretary of the Department of Cultural Resources and of her counterpart in the Department of Community Colleges.

Pursuant to G.S. 115A-3, the Department of Community Colleges was created by and falls under the control of the State Board of Education. Though the Department of Community Colleges is listed as the cosponsor of the Visiting Artists' Program, the authority to administer this program is vested in the State Board of Education. The State Board has not delegated to the Department of Community Colleges the specific power to pass regulations governing the Visiting Artists' Program. As such, it is the opinion of this Office that the State Board of Education retains the authority to approve the proposed regulation on behalf of the Department of Community Colleges.

The second question posed is whether a four-year limitation would create a form of discrimination that would violate the civil or constitutional rights of any person. It is the opinion of this Office that limiting the participation of artists to four consecutive years in the program would not constitute an unlawful form of discrimination. Such a limitation would be unlawful and discriminatory only if it created an unreasonable classification between those who are eligible for the program and those who are not eligible. Assuming that the criteria for selecting artists are fair, the mere fact that a four-year limitation on the period of participation is imposed would not represent the type of invidious discrimination that is prohibited by the Fourteenth Amendment to the United States Constitution or by the Constitution of the State of North Carolina.

Rufus L. Edmisten, Attorney General
Thomas M. Ringer, Jr.
Associate Attorney General

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25 April 1975

Subject:	Motor Vehicles; Operating Mini-Bikes, Motorcycles or Go-Carts on Subdivision Streets Which are Not State Roads or Maintained by the State
Requested by:	Mr. Nelson L. Sheppard Deputy Sheriff Beaufort County
Question:	Can mini-bikes, motorcycles or go-carts be operated legally on subdivision streets and highways which are not on the State's system of public roads without complying with the equipment, registration and insurance requirements of Chapter 20 of the North Carolina General Statutes?
Conclusion:	Mini-bikes, motorcycles or go-carts may not be operated on subdivision streets or highways without being in compliance with the provisions of Chapter 20 of the North Carolina General Statutes.

The fact that a road in a private subdivision or development is not on the State highway system of public roads, nor under the control of any political subdivision of the State, does not mean that it is not a public street or highway subject to application of the North Carolina Motor Vehicle Laws under Chapter 20 of the North Carolina General Statutes. In *Highway Commission v. Thornton*, 271 N.C. 227, at 243, Justice Lake said:

> "It is frequently stated that if the public generally may use the road, as a matter of right, on an equal, common basis, the road is a public road irrespective of how many people actually use it."

Under Article 1, Chapter 20 of the North Carolina General Statutes, the term highway or street is defined as follows:

"§20-4.01. *Definitions.*–...(13) Highway or Street. - The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms 'highway' or 'street' or a combination of the two terms shall be used synonymously."

If the streets and roads in the subdivision you describe in your letter have been laid out, opened and maintained for the benefit of the residents of the subdivision, and members of the general public who call upon them, then these roads and streets would be public highways and subject to the motor vehicle laws. If the mini-bikes, motorcycles or go-carts in question do not comply with the equipment, registration and insurance requirements of Chapter 20 of the North Carolina General Statutes, or the operators thereof do not possess the requisite license to operate motor vehicles, it would appear that violations of the North Carolina Motor Vehicle Laws are being committed. Permission granted by the developer or owner of the subdivision to such individuals to operate these vehicles would not be valid since no person can grant permission to another to violate the laws of this State.

Rufus L. Edmisten, Attorney General
James E. Magner, Jr.
Assistant Attorney General

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2 May 1975

Subject: State Departments, Institutions, and Agencies; Community Colleges and Technical Institutes; Administrative Procedure Act; Chapter 150A

Requested by: Mr. Charles R. Holloman
Vice President
Policy and Planning
Department of Community Colleges

Question: Are the constituent institutions of the Community College System agencies of the State government within the meaning of the North Carolina Administrative Procedure Act, Chapter 150A of the General Statutes?

Conclusion: No.

The question has arisen whether the individual educational institutions within the Community College System are "agencies" of the State government of North Carolina within the meaning of that term in Section 150A-2(1) of the Administrative Procedure Act, Chapter 150A of the General Statutes. If those institutions are agencies for purposes of the Administrative Procedure Act, then they are subject to all of its provisions requiring certain procedures to be followed in adopting rules and regulations and in conducting administrative hearings, and requiring the filing of all rules with the Office of the Attorney General.

G.S. 150A-2(1) provides:

> "'Agency' means every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina but does not include those agencies in the legislative or judicial branches of the State government; and does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, or county or city boards of education, other local public districts, units or bodies of any kind, or private corporations created by act of the General Assembly."

Although the State Board of Education and the Department of Community Colleges exercise some control over the individual educational institutions which comprise the Community College System, it is our opinion that these institutions are instrumentalities of county government, in much the same sense that county boards of education are instrumentalities of county government, and are

not to be considered State institutions or agencies within the definition of G.S. 150A-2(1). The question of the constitutional relationship of institutions and agencies as instrumentalities of the State or of subordinate levels of government is to a great degree indicated by reference to what level of government is given by law the revisionary right to the real property of the institution or agency in case of its being dissolved as a municipal corporation and ceasing to operate. In that regard, G.S. 115A-9 provides in part:

> "In the event that an institution shall cease to operate, title to all real and personal property donated to the institution or purchased with funds provided by the tax levying authorities, except as provided for in Section 115A-4, shall vest in the county in which the institution is located...."

Moreover, the institutions comprising the Community College System do not have State-wide jurisdiction and any jurisdiction exercised by any individual institution is limited to that institution and no other. In *Refining Company v Board of Aldermen*, 284 N.C. 458 (1974), the Court defined a State administrative agency as "an authority, board, bureau, commission, committee, department, or officer whose jurisdiction is statewide." *Id.* 470.

We conclude, therefore, that the individual institutions within the Community College System are not agencies of the State government of North Carolina as defined in the Administrative Procedure Act and need not comply with the requirements of Chapter 150A once it goes into effect.

Rufus L. Edmisten, Attorney General
Andrew A. Vanore, Jr.
Deputy Attorney General

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2 May 1975

Subject: Mental Health; Involuntary Commitment; Acceptance of Respondent at Regional Mental Health Facility Prior to Receipt of Commitment Order

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Question: May a respondent who has been involuntarily committed to a regional facility of the Division of Mental Health Services be accepted there prior to receipt of a copy of the district court order so committing him but upon telephonic representation of the appropriate clerk of court that such order has been issued?

Conclusion: The respondent described may be accepted at the regional mental health facility prior to actual receipt of a copy of the commitment order, but the following precautionary steps should be taken:

(a) The actual order should be read to the facility personnel so as to insure that it is in order and that its provisions are fully understood.

(b) Oral assurance should be received from the clerk's office that the order has been duly signed and will be delivered immediately to the facility.

(c) Oral assurance should be received from the clerk's office that, absent prompt receipt of the actual order (or should the order be in improper form upon receipt), the court will take immediate action to rectify the situation including, if necessary, the immediate removal of the respondent from the facility.

Nowhere in Article 5A, Chapter 122, is there an absolute requirement that a copy of the commitment order in an involuntary

commitment proceeding be actually presented to a regional mental health facility at the time a respondent is taken there pursuant to such order. However, customary practice and sound reasoning dicate that the facility is entitled to be presented with such order.

It appears that occasionally a respondent who has been ordered to be committed to a regional mental health facility does arrive at the facility in the custody of a law enforcement officer who does not have a copy of the commitment order in his possession. In those cases, it has been the practice of the facility personnel to accept the telephonic representations of the clerk of the appropriate court that a commitment order has, in fact, been issued and will be forwarded by mail. Further, it appears that in some instances the order has not been forthcoming, or, upon receipt, has been found to be defective in some aspect. As a result, concern has arisen as to the personal liability of facility employees for unlawful detention of a respondent who has been accepted under one or more of these conditions.

Of course, the order of a court is disobeyed at an individual's risk. A necessary corollary to this precept is the requirement that the individual concerned be given access to the court order so as to be able to interpret and evaluate its contents.

There can be no question that the order is the best evidence of its contents and that the facility is entitled to be served with a copy of the order if compliance therewith is to be required. It would be expected that, only in an unusual situation, would a facility be expected to accept a committed patient without a copy of the commitment order. In these situations, sensible arrangements calculated to avoid refusal to accept a mentally ill person or an inebriate–with the resultant delay in the institution of appropriate treatment and the unwelcome prospect of additional transportation of the respondent about the State–are desirable. Unquestionably, however, personnel at the receiving facility are entitled to protection against the very real specter of a subsequent damage suit in the event of improper or unauthorized detention of a respondent. The precautionary steps described above would seem to afford a suitable middle course which would enable prompt treatment of the individual while adequately protecting the facility personnel.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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2 May 1975

Subject: State Departments, Institutions and Agencies; Governor's Advocacy Council on Children and Youth; Relationship to the Secretary of Human Resources, the General Assembly, and Other State Agencies

Requested by: Mr. Ron Attkisson, Chief
Child Advocacy Section
Office for Children

Question: What is the relationship of the Governor's Advocacy Council on Children and Youth to the Secretary of Human Resources, the General Assembly and other State agencies?

Conclusion: The Governor's Advocacy Council on Children and Youth has the authority and the responsibility to be an advocate for children and youth within all of State government.

Chapter 935, 1971 Session Laws, created the Governor's Advocacy Commission on Children and Youth. The Executive Organization Act of 1973 (1973 Session Law Chapter 476) changed the aforementioned name to the Governor's Advocacy Council on Children and Youth. G.S. 110-67 through G.S. 110-70 and G.S. 110-72 pertaining to the establishment and structure of the Commission and the appointment of an administrator therefor were repealed and G.S. 143B-186 and G.S. 143B-187 pertaining to the establishment and structure of the Council were enacted by Chapter 476.

G.S. 143B-186 provides in part that "There is hereby created the Governor's Advocacy Council on Children and Youth of the Department of Human Resources." G.S. 143B-3(5) defines "Council" as "a collective body which advises the head of a principal department or his designee as representative of citizen advice in specific areas of interest." G.S. 143B-186 lists the functions and duties of the Council as being an advocate for youth within State and local governments, reviewing continuously existing programs of State government for children and youth, coordinating existing services for children and youth between State and local agencies, advising the Secretary of Human Resources, and performing the duties specified in Chapter 110. The definition of "Council" cited above and the duty of the Council expressed in G.S. 143B-186 fixes the relationship between Secretary and Council as one where the Council advises the Secretary in specific areas of interest. The areas of interest are those matters which the Council is statutorily authorized to consider and concerning which the Secretary desires to be advised.

G.S. 110-71 also sets forth powers and duties of the Council. G.S. 110-71(7) as enacted by 1971 Session Law Chapter 935 provided that the Commission shall make reports to the Governor and General Assembly. This subdivision was amended by 1973 Session Law Chapter 476 to provide that the Council make reports to the Secretary of Human Resources for transmittal to the Governor.

However, G.S. 110-71 was again amended by 1973 Session Law Chapter 1293, Section 9, which added subdivisions (9), (10), (11) and (12). Subdivision (10) provides that the Council shall review each plan described in subdivision (9) and make recommendations to agencies and departments and make reports to the General Assembly. Therefore, Chapter 1293 reestablished the responsibility and the authority for the Council to make reports to the General Assembly concerning programs and services for children.

As noted above in G.S. 143B-186 and as described in detail in G.S. 110-71, the Council has the responsibility and the authority to be an advocate for youth within State government, to review existing programs for children and youth in State government, to work with State agencies to eliminate duplication of services, to

survey State programs for children and youth, and to make recommendations to other State agencies and departments concerning the conclusions of such surveys.

In summary, the Governor's Advocacy Council on Children and Youth has the authority and responsibility to advise the Secretary of Human Resources, report to the General Assembly, and to advise and work with other State departments and agencies. The General Assembly has given the Council the authority and responsibility to be an advocate for children and youth within all of State government.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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8 May 1975

Subject:	Motor Vehicles; Driver's License; Bikes with Helper Motors
Requested by:	Ms. Sarah F. Patterson Assistant District Attorney Seventh Solicitorial District
Question:	Is a motor vehicle operator's license required to operate a bike equipped with a helper motor of less than one brake horsepower on the highways and streets?
Conclusion:	Yes.

The specific laws relating to bikes with helper motors rated at one brake horsepower or less and incapable of exceeding 20 miles per hour appear in G.S. 20-4.01(27)d. and G.S. 20-50.1, which read as follows:

> "§ 20-4.01. *Definitions.*--Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

* * *

(27) Passenger Vehicles.--

* * *

d. Motorcycles.--Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour." (1975 Amendment, Chapter 94).

"§20-50.1. *Certain bicycles with motors exempt.*- Notwithstanding any of the provisions of Chapter 20 of the North Carolina General Statutes, all pedal bicycles with helper motors rated at one brake horsepower or less and incapable of exceeding 20 miles per hour shall be exempt from all title and registration requirements of Chapter 20, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of 16 years."

Also provided under G.S. 20-4.01 is the definition of motor vehicle:

"(23) Motor Vehicles.--Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle."

G.S. 20-4.01(27)d., as amended, excludes bicycles with helper motors rated less than one brake horsepower and capable of 20

miles per hour or less from the definition of motorcycles, thereby exempting operators of such bicycles from the helmet and lighting requirements of G.S. 20-129(c), 20-140.4, and the requirements of 20-146.1 (operating more than two abreast, etc).

G.S. 20-50.1, by excluding bicycles with helper motors of less than one brake horsepower and maximum speeds of less than 20 miles per hour from registration and title requirements, effectively exempts such bikes from registration cost (plates) and insurance requirements. This section does place an age limit of 16 years or over on operators.

G.S. 20-4.01(23) defines a motor vehicle, which would include the bike in question, and no where is it exempt from this definition. G.S. 20-7(a) requires an operator's or chauffeur's license prior to the operation of a motor vehicle which would include the bike with helper motor.

G.S. 20-7(a) reads as follows:

> "§20-7. *Operators' and chauffeurs' licenses; expiration; examinations; fees.*–(a) Except as otherwise provided in G.S. 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Department under the provisions of this Article. Except as otherwise provided in G.S. 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the Department under the provisions of this Article. Any person who takes up residence in this State on a permanent basis shall be exempt from the provisions of this subsection for a period of 30 days from the date that residence is established, provided he is properly licensed in the jurisdiction of which he is a former resident."

Not being exempt under the provisions of G.S. 20-8 or other applicable statutes, an operator's or chauffeur's license would be required to operate a bicycle equipped with a helper motor rated

less than one brake horsepower and capable of speeds of 20 miles per hour or less.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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8 May 1975

Subject:	Licenses and Licensing; Chiropractors; Constitutionality of House Bill 725
Requested by:	Honorable R. C. Soles, Jr. N. C. House of Representatives
Question:	Does House Bill 725 conflict with either the Constitution of North Carolina or the Constitution of the United States?
Conclusion:	House Bill 725 does not conflict with either the Constitution of North Carolina or the Constitution of the United States.

House Bill 725 introduced in the North Carolina House of Representatives on April 14, 1975, seeks to amend G.S. 90-143 by redefining chiropractic, the perimeters of chiropractic practice, the duties of the North Carolina State Board of Chiropractic Examiners to examine applicants for chiropractic licenses, and the requirements, educational and otherwise, for admission to and the scope of the examination for a chiropractic license.

An opinion respecting the constitutionality of this proposed legislation is requested of this Office.

In considering the constitutionality of House Bill 725, we begin with the following principle articulated by Justice Ervin in *State v. Ballance*, 229 N. C. 764, 51 S. E. 2d 731 (1949):

> "If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or

substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm...Where the practice of a profession or calling requires special knowledge or skill and intimately affects the public health, morals, order, or safety, or the general welfare, the Legislature may prescribe reasonable qualifications for persons desiring to pursue such profession or calling, and require them to demonstrate their possession of such qualifications by an examination on the subjects with which such profession or calling has to deal as a condition precedent to the right to follow such profession or calling."

Ballance, 229 N. C. at 769, 770, 51 S. E. 2d at 735.

Consonant with the above doctrine, it has been held that statutes providing for the licensing of pilots, attorneys, barbers, plumbing and heating contractors, dentists, real estate brokers, pharmacists, and taxicab operators are constitutional. See 2 Strong, N. C. Index 2d, Constitutional Law, §13, pp 207-208. It is the position of this Office that House Bill 725 is clearly analogous to those statutes requiring licenses for professions and occupations substantially affecting the public health, morals, order, or safety, or the general welfare. Accordingly, in our judgment, this bill embodies a valid exercise of the State's police power which, consequently, we feel will withstand constitutional scrutiny.

However, the inquiry does not stop with the above conclusion, for House Bill 725 has delegated to the North Carolina State Board of Chiropractic Examiners the duty to examine for license to practice chiropractic every applicant who complies with certain enumerated requirements. Hence, a subsidiary question is whether this is a proper delegation of legislative power to an administrative board. The following language from *State v. Harris*, 216 N. C. 746, 754, 6 S. E. 2d 854, 860 (1940), is particularly appropriate in resolving this issue:

"In licensing those who desire to engage in professions or occupations such as may be proper

> subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance."

In our judgment the second page of House Bill 725 explicitly prescribes a sufficient standard for guiding the North Carolina State Board of Chiropractic Examiners in conferring or refusing to confer licenses to practice chiropractic.

A final concern is whether House Bill 725 has improperly delegated legislative power to the chiropractic colleges to the end that these colleges are implicitly empowered to widen the scope of the chiropractic license by teaching diagnosis and analysis of the human body and its diseases by methods not contemplated within the legal definition of chiropractic practice. In *State v. Baker*, 229 N. C. 73, 48 S. E. 2d 63 (1948), Justice Ervin made the following telling observations relating to the practice of osteopathy:

> "The statutes clearly contemplate that osteopathic physicians shall diagnose and treat diseases by employing osteopathy. The words 'as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society' do not set at large the signification of 'osteopathy,' permitting the colleges to give it any meaning they choose. The thing to be taught is osteopathy–'the science of healing without the use of drugs.' The Legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term 'osteopathy.' The colleges cannot change the law of North Carolina, or widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula."
>
> *Baker*, 229 N. C. at 78, 48 S. E. 2d at 65.

Employing this reasoning, it is our opinion that the perimeters of the practice of chiropractic are clearly delineated in House Bill 725,

and that the words "as taught in accredited chiropractic colleges" do not "set at large the signification" of "chiropractic." See lines eight through twenty, page one, House Bill 725. We do not perceive that House Bill 725 delegates any legislative power to the chiropractic colleges to enlarge the scope of chiropractic practice. The colleges are simply determining, selecting, and teaching the most desirable methods of doing what is comprehended within the term "chiropractic."

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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13 May 1975

Subject: Mental Health; Courts; Collection of Fees for Services Rendered by Local Mental Health Clinics

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Questions: (1) Are local mental health clinics required to collect fees for services rendered?

(2) May a local mental health clinic collect fees from an individual when a court of competent jurisdiction has determined that such collection will not be made?

Conclusions: (1) G.S. 122-35.10 makes the collection of fees by child-guidance clinics optional, while fees for serving adult patients must be collected from individuals who are able to pay for the services rendered.

(2) A local mental health clinic may not collect fees from an individual when a court of competent jurisdiction has determined that such collection will not be made.

G.S. 122-35.10 provides as follows:

"§122-35.10. *Fees for services.*–The collection of fees for services performed in the child-guidance clinic shall be optional with the local mental health authority. The local clinics serving adult persons shall provide for the collection of fees from individuals accepted for services who are able to pay for such services. No person is to be refused services because of the inability to pay the fees. The fees to be charged are to be fixed by the local mental health authority and all funds so collected shall be utilized for the fiscal operation of the local mental health authority."

These provisions are relatively self explanatory and should present no complications in situations involving children or adults who voluntarily present themselves to local clinics. It would seem that the overall legislative intent was to insure that no one would be denied needed services because of indigency, but, on the other hand, to enhance clinical operations as fully as possible by the collection of funds where appropriate. Apparently, in the ordinary situation, the ability to pay would be an administrative determination by the clinic. In the event of an individual's refusal to pay assessed charges, the only avenue for enforcing the clinic's claim would be via a judicial determination of the issue to financial liability–including ability to pay and the actual amount due.

In a situation where the services are rendered at the direction of a court which has already made a factual finding as to the propriety of charges being made against the individual, the situation is changed. Typical examples in this area would be situations wherein action has been taken by the court under the provisions of G.S. 7A-286(6), as applicable to children and G.S. 122-65.8, as applicable to chronic alcoholics. Thus, where a court vested with authority to effect appropriate disposition in a given case has adjudicated the issue of

liability for payment of charges–obviously including the element of ability to pay–such court finding and court order would be controlling over any administrative determination on the subject by the clinic.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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13 May 1975

Subject: Medical Examiner, Coroner; Custody and Control of Dead Body when Death Caused by Criminal Act or Default

Requested by: Mr. Mosley G. Boyette, Sr.
Moore County Attorney

Question: What are the respective duties of a county medical examiner and coroner as to custody and control of a dead body when circumstances indicate death was caused by the criminal act or default of some person?

Conclusion: Chapter 152 of the General Statutes, Article 21 of Chapter 130 of the General Statutes and G.S. 90-217 must be construed together to determine what the respective duties of the medical examiner and coroner maybe but it is clear the medical examiner has control and custody of the body.

In those counties having both a medical examiner and a coroner, the statute imposes reciprocal duties as to notice to each other so that both officials may perform their respective duties.

The coroner is not required to be notified, and has no duties to perform except in those cases where death was probably caused by

the criminal act or default of some person. G.S. 152-7.

The medical examiner must be notified, by any person having knowledge of a death caused apparently by criminal act or default, suicide, or when the deceased is an inmate in any penal or correctional institution, or death was under any suspicious, unusual or unnatural circumstances. G.S. 130-198.

G.S. 152-7(7) requires the coroner to notify the district attorney and the medical examiner immediately upon his knowledge of a death under circumstances set out in G.S. 130-198.

G.S. 130-202.2 requires the medical examiner, in every case set out in G.S. 130-198, to notify the coroner so that the coroner can hold an inquest, if one is necessary. This statute expressly provides that the body shall remain in the custody and control of the medical examiner.

G.S. 130-198 provides that no person shall disturb the body at the scene of death until authorized by the county medical examiner.

From the foregoing it is clear that both the coroner and the medical examiner must be notified when the death is apparently caused by the criminal act or default of some person. Both are required to make an investigation. Only the coroner can hold an inquest if one is necessary. The medical examiner has the authority to order an autopsy. The coroner does not have such authority although he may request the medical examiner to do so.

G.S. 130-199 provides that the medical examiner shall take charge of the dead body. G.S. 130-198 provides no person shall disturb the body at the scene of death until authorized by the medical examiner. G.S. 130-202.2 provides that the body shall remain in the custody and control of the medical examiner.

Clearly, the control and custody of the dead body is in the complete charge of the medical examiner.

Both the coroner and medical examiner are to investigate when death is apparently from criminal acts or default.

The coroner is to determine when, by what means the deceased came to his death, and if by criminal act or default, the coroner holds an inquest. If necessary to his investigation, he may request the medical examiner to have an autopsy performed. He makes a report to the district attorney and the medical examiner.

The medical examiner is to determine the cause and manner of death, and may order an autopsy or other pathologic study. He reports to the persons named in G.S. 130-199 and -200.

Thus the statutes impose cooperative duties upon the coroner and medical examiner, to the end that the exact cause and manner of death may be determined. Where death is by criminal act or default, the coroner holds an inquest. Both make reports of investigation to the district attorney. In all cases, the control and custody of the dead body remains with the medical examiner.

Rufus L. Edmisten, Attorney General
James F. Bullock
Deputy Attorney General

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16 May 1975

Subject: Mental Health; Courts; Criminal Law; Extension of 60-Day Period for Determining Mental Competence of Defendant

Requested by: Dr. Bob Rollins
Director, Forensic Services
Dorothea Dix Hospital

Questions: (1) May the commitment of a criminal defendant to a State mental health facility for observation and treatment under the provisions of G.S. 122-91 be extended beyond a 60-day period?

(2) Will this situation change under the "Criminal Procedure Act", effective July 1, 1975?

Conclusions:

(1) No. If additional time is required for evaluation of the mental competence of a defendant in a criminal case, Article 5A of Chapter 122 should be utilized, where appropriate.

(2) After July 1, 1975, under the provisions of the "Criminal Procedure Act":

(a) the temporary commitment for determination of a defendant's capacity to proceed with his trial is limited to 60 days;

(b) a hearing then must be held to determine the defendant's capacity to proceed with the trial; and

(c) if the defendant is then found to be incapable of proceeding with the trial, the court must direct the initiation of proceedings designed to commit the defendant to a mental health facility under the provisions of article 5A, Chapter 122.

G.S. 122-91 authorizes the responsible judge to commit an alleged criminal indicted for or charged with a felony to a State facility for a 60-day period of observation and treatment when question has arisen as to his mental competency to participate in his trial. It appears that, in some instances, the mental health professionals at the State facility are unable to reach a firm opinion concerning a patient's competency within this 60-day period.

The statute in question specifically authorizes commitment "for a period of not exceeding 60 days." At the end of that period, the administrator of the facility is required to notify the appropriate clerk of court as to the findings and recommendations. If competent, action is taken to return the defendant for criminal trial. If he is found not competent, it is the duty of the clerk of the county

in which the defendant is committed "to initiate proceedings to have the alleged criminal committed for a minimum necessary period under the procedures prescribed in G.S. 122-65."

The section referred to (G.S. 122-65) was a part of Article 7, entitled "Judicial Hospitalization." The statutes included within the original Article 7 have been held to be unconstitutional (See *In re Confinement of Hayes*, 18 N.C. App. 560, appeal dismissed, 283 N.C. 753 (1973)), Article 7 has been repealed, and Article 5A entitled "Involuntary Commitment" has replaced it. As a result, when additional psychiatric observation and treatment is in order after the initial 60-day period, Article 5A is the only tool for obtaining it.

It is noted that the "Criminal Procedure Act" makes more specific provisions for handling the type of case described. See G.S. 15A-1001 through G.S. 15A-1008, effective July 1, 1975. While the terminology "judicial hospitalization" is utilized in these new statutes, as previously indicated, Article 5A is the only statutory avenue available to secure the result obviously desired by the General Assembly.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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20 May 1975

Subject: Health; Education; Immunization; Chiropractors; Exemption from Immunization of Child of Chiropractor

Requested by: Dr. J. N. MacCormack, Head
Communicable Disease Control Branch
Epidemiology Section
Division of Health Services
N. C. Department of Human Resources

Question: Does Article 9 of Chapter 130, General Statutes of North Carolina, authorize the

exemption of a child of a chiropractor from immunization requirements as set forth therein due to the father's request for exemption based upon his professional beliefs?

Conclusion: No.

Article 9, Chapter 130, requires the immunization of children in this State against various diseases. G.S. 130-87. Unexcused failure to comply with the immunization requirements can result, *inter alia*, in exclusion of the child from school attendance. G.S. 130-90. Exceptions may be made upon presentation of a medical doctor's certificate that a particular immunization may be detrimental to a child's health (G.S. 130-91), or upon the making of a satisfactory showing that immunization is against the parents' religious beliefs. G.S. 130-92.

It appears that the chiropractor-father involved in the present situation states that it is a basic tenet of chiropractic discipline that the body has its own natural capability to combat disease, and, accordingly, to create its own antibodies without the injection of foreign substances which serve to create an artificial homeostasis. In short, the father finds the compulsory immunization described in Article 9 to be directly contrary to the scientific discipline in which he is trained.

It is now well settled that it is within the "police" power of a State to preserve the health, welfare, and safety of its citizens by requiring immunization against communicable diseases. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In fact, a great majority of the states have enacted compulsory or local option immunization laws, and these statutes so enacted have been universally upheld as proper exercises of the police power of the state. See *Itz v. Penick*, 493 S.W. 2d 506 (1973), and cases cited therein.

The present North Carolina statutes make no exception for the case of a personal belief or philosophy of a parent not founded upon a religious belief. Compare *Matter of Elwell*, 284 N.Y. 2d 924 (1967); *McCartney v. Austin*, 293 N.Y. 2d 188 (1968). Thus, the exception described in the question is not authorized by North Carolina statutes.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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20 May 1975

Subject: Mental Health; Corrections; Courts; Voluntary Admission of Convict to State Regional Mental Health Facility

Requested by: Dr. Bob Rollins, Director
Forensic Services
Dorothea Dix Hospital

Question: May an inmate who has been committed to a penal institution of the Department of Correction be voluntarily admitted to a regional mental health facility operated by the Division of Mental Health Services?

Conclusion: No.

G.S. 122-85 provides that a convict who becomes mentally ill and imminently dangerous to himself or others shall be processed in accordance with Article 5A, Chapter 122, except where the provisions of that Article are manifestly inappropriate. This Section further sets forth certain provisions uniquely tailored to make applicable to this type of situation the involuntary commitment procedures delineated in Article 5A.

The General Statutes contain no other provision authorizing the voluntary admission to a State mental health facility of an inmate in one of our penal institutions. While Article 4 of Chapter 122 speaks in terms of any person being able to seek admission by presenting himself to a mental health facility, this phraseology clearly does not apply to an individual who has been convicted of a crime and committed to the Department of Correction or a penal institution therein for service of a specified sentence. It was clearly intended by the General Assembly that a convict who does not meet

the criteria of G.S. 122-85 will receive his treatment at the appropriate penal institution. See G.S. 148-19.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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28 May 1975

Subject: Constitutional Law; Elections of County Board of Education

Requested by: Honorable H. M. Michaux, Jr.
House of Representatives
North Carolina General Assembly

Question: Is the system employed in the County of Durham, whereby the residents of the City of Durham vote for the members of the Durham County Board of Education, constitutional in light of the recent decision of *Locklear v. Board of Elections*, No. 74 - 1856, C.A. 4 (April 23, 1975)?

Conclusion: The system is unconstitutional in some respects but in other respects the procedure employed passes constitutional muster.

According to the information with which you have provided this Office, the organization and methods of selecting the Board of Education of Durham County and the City of Durham are as follows:

The Board of Education of the County of Durham consists of five members who are elected for terms of two years each by the voters of the entire county. The voters residing within the City of Durham participate in this election as do those persons residing within the geographical jurisdiction of the Durham County Board of Education. The Board of Education of the City of Durham consists of six

members who serve for a term of four years and who are appointed by the City Council of Durham, a body elected exclusively by the resident voters of the city. Thus, there exist two distinct and independent administrative bodies, the County Board, elected by both city and county residents, and the City Board, appointed by a body elected by city residents. It is important to note that some voters who reside within the city, and who vote in elections for the members of the City Council, are within the administrative jurisdiction of the County Board of Education.

The obvious issue in determining the propriety of Durham's approach, then, is whether the system which allows city residents to vote for members of the County Board is constitutionally over inclusive; that is, whether the voters residing in the City of Durham have a sufficient interest in the decisions and acts of the County Board to justify their participation in the election of the members, or whether the conferral of the franchise on the city group serves to illegitimately dilute the votes of the county residents who reside within the administrative and geographical jurisdiction of the County Board and who are vitally interested in the workings of the Board.

It is a principle well settled by the federal courts that neither the State, nor any subdivision thereof, may deny the franchise to those having a "distinct and direct" interest in the decisions and activities of a given elected body unless there can be ascertained some "compelling State interest" for doing so. *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

But, not only must a system be free from methods which unconstitutionally *deny* the vote, it must as well avoid procedures which improperly foster dilution of the votes of persons directly and primarily interested in a given governmental function by the votes of those not effected by the function. "Dilution" of the strength of a vote is not, in and of itself, a negative concept, but unconstitutional dilution will not be tolerated by the Courts.

The facts presented to this Office show no compelling State interest in the existence of a system whereby the total eligible residency of the City of Durham helps to elect the members of the County Board of Education. As was the situation in *Locklear v. Board of Elections*, No. 74 - 1856, C.A. 4 (April 23, 1975), "(e)ach school

board seems to be an independent body corporate with an exclusive geographical jurisdiction within which each board has full responsibility for the operation of its own schools." The powers, duties and responsibilities of the two Boards are parallel within the respective jurisdictions. This Office has not been informed of any mutual agreements, whether formal or informal, which exist between the two Boards. Such agreements, however, would be in no way germane to the issue at hand as long as either of the two Boards could only be characterized as "one participant in a consensual process." *Locklear, supra*. We have been made aware of no immutable agreements between the two bodies. Furthermore, there seems to be no function of the County Board which is of common interest to the voters of both jurisdictions.

It is, therefore, the opinion of this office that no compelling State interest is served by this system, and that the system is unconstitutional in that it permits the residents of the city to vote in the election of the County Board members. Such an arrangement clearly dilutes unconstitutionally the votes of a county geographical region, thereby denying the county voters equal protection of the laws.

It would be well, however, to continue briefly and to address the secondary issue posed by your inquiry:

Whether there can be made any distinction between the two intracity groups of voters as to their right to be represented on the County Board. It does appear that a distinction should be made and that one group of city voters may continue under the present system to constitute a portion of the County Board electorate. To deny those resident voters of the city who fall within the County School Board administrative jurisdiction a right to participate in the election of County Board members, *or members of the City Council*, the activities of which directly affect those voters, would be to offend the principles espoused in both *Kramer* and *Locklear*. It appears that the only consititutionally feasible method of providing for the membership of the two boards in the future lies in allowing all qualified city voters to participate in the election of the Durham City Council while permitting only those city residents falling within the jurisdiction of the County Board of Education to exercise their franchise in conjunction with the county voters in the election of the members of the County Board of Education.

Rufus L. Edmisten, Attorney General
James Wallace, Jr.
Associate Attorney

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3 June 1975

Subject: Public Records; Police Investigative Memoranda and Reports; Right of Public Inspection

Requested by: Honorable J. Hubert Haynes
Sheriff
McDowell County

Question: Are sheriff's department investigative reports and memoranda concerning investigation of crimes public records within the sense of Chapter 132 of the General Statutes and thereby subject to public inspection?

Conclusion: Sheriff's department investigative reports and memoranda concerning investigation of crimes are not public records within the sense of Chapter 132 of the General Statutes and are not thereby subject to public inspection.

It is our opinion that police and sheriff's department investigative reports and memoranda concerning investigations of crimes are not public records within the sense of Chapter 132 of the General Statutes and its requirement that public records be subject to reasonable inspection.

There is some authority for the proposition that records relating to the fact of an arrest, the charges against an individual, and the status of disposition of such charges, are public records within the sense of Chapter 132 of the General Statutes (41 N.C.A.G. 407).

The definition of public records is contained in G.S. 132-1 which reads as follows:

> "Public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business."

The requirement for inspection and examination of public records is found in G.S. 132-6.

Investigative reports and memoranda prepared by police officers for the purpose of preparing prosecution of criminal offenses by the district attorney are not "public records" as contemplated by Chapter 132 of the General Statutes. Otherwise, there would be no need for criminal discovery as contemplated by present law (G.S. 15-143 relating to a bill of particulars) and Article 48 of Chapter 15A (G.S. 15A-901 through 15A-910) which relates to discovery in criminal cases.

To permit the inspection of law enforcement officers' investigative reports by the general public under the authority of Chapter 132 of the General Statutes would effectively frustrate and unnecessarily complicate the role of law enforcement and the district attorney in bringing the accused persons to justice. The risk of subornation of perjury and suppression of evidence has been recognized by our courts even where an accused party is seeking discovery under judicial supervision. In *State v. Goldberg*, 261 N.C. 181, 192 (1963), the court noted that the burden of showing facts justifying inspection is on the moving party. 23 C.J.S., Criminal Law, § 955 (2), p. 796.

The indiscriminate exposure of factual details of allegations and investigations of misconduct which are or may be the subject of a future criminal trial could jeopardize an accused person's right to a fair trial free of prejudical pretrial publicity, *Shepherd v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600 (1966).

Rufus L. Edmisten, Attorney General
Sidney S. Eagles
Assistant Attorney General

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10 June 1975

Subject: Public Officers and Employees; Double Office Holding; Trustee of Community College - Member of State Board of Elections

Requested by: Mr. Samuel H. Long, III
Legal Counsel to the Governor

Question: Does a member of a community college board of trustees hold an appointive office within the meaning of Chapter 286, Session Laws of 1975, so as to disqualify that person from serving as a member of the State Board of Elections?

Conclusion: Yes.

The establishment, organization and administration of community colleges is a joint program between the State and the local government units where the institution is located. The trustees are appointed, some by the local boards of education, some by the board of commissioners of the county in which the institution is located, and some by the Governor. Pursuant to G.S. 115A-8 the trustees serve for a term fixed by statute. G.S. 115A-9 constitutes the board of trustees a body corporate and confers upon the board powers, duties and authority sufficient to constitute them public officers.

Chapter 286, Session Laws of 1975, provides that no person shall be eligible to serve as a member of the State Board of Elections who holds any elective or appointive office under the government of the United States, or of the State, or any political subdivision thereof. It appears, therefore, that a member of the board of trustees of a community college is an appointive officer of either the State

or a political subdivision thereof and for purposes of this opinion, it does not appear necessary to decide whether he is a State officer or an officer of a political subdivision.

G.S. 115A-10 provides that all trustees of institutions in this Chapter are declared to be commissioners for special purposes within the meaning of Article XIV, Section 7 of the Constitution of North Carolina. However, this statute must be disregarded since the Constitution has been rewritten since its enactment and there is no provision in Article VI, Section 9 of the North Carolina Constitution relating to commissioners for special purposes.

Pursuant to G.S. 128-1.1, enacted under the authority of Article VI, Section 9 of the Constitution, any person who holds an appointive office in the State or local government is authorized to hold concurrently one other appointive office in either the State or local government.

However, G.S. 128-1.1 is not controlling where the General Assembly has expressly provided that a particular office cannot be held with any other elective or appointive office.

We conclude, therefore, that a member of the board of trustees of a community college is an appointive officer under the government of the State of North Carolina or a political subdivision thereof and that such person would not be eligible to serve as a member of the State Board of Elections, under the provisions of Chapter 286, Session Laws of 1975.

Rufus L. Edmisten, Attorney General
James F. Bullock
Deputy Attorney General

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10 June 1975

Subject: Mental Health; Involuntary Commitment and Voluntary Admission; Patients' Rights in Area Mental Health Programs, Community Centers, Private Hospitals, Halfway Houses and Group Homes

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
Department of Human Resources

Questions: Do parts 2 and 3 of Article 3, Chapter 122, providing "Patients' Rights" to mental patients apply to:

(1) Area and community mental health programs?

(2) The inpatient units or program of a mental health center?

(3) The partial hospitalization program of a mental health center?

(4) The outpatient program of a mental health center?

(5) A local residential program component (i.e., halfway house or group home)?

(6) A local inpatient facility operated privately or by a general hospital, but under contract with the mental health center?

(7) A private psychiatric facility that is not under contract with the Division of Mental Health Services or with a local program to provide services, but is licensed or designated to receive involuntarily committed patients?

(8) A private psychiatric facility which receives only voluntary patients and which is not under contract with the Division of Mental Health Services or a local community mental health program?

Conclusion: Parts 2 and 3 of Article 3, Chapter 122, providing "Patients' Rights" to mental patients applies to all of the entities described with the exception of a local or residential program component such as a halfway house or group home.

In North Carolina certain basic rights are statutorily insured to each patient of a "treatment facility". See G.S. 122-55.1 and G.S. 122-55.13. The terminology "treatment facility" is defined in G.S. 122-36(g), as follows:

> "(g) The words 'treatment facility' shall mean any hospital or institution operated by the State of North Carolina and designated for the admission of any person in need of care and treatment due to mental illness or mental retardation, any center or facility operated by the State of North Carolina for the care, treatment or rehabilitation of inebriates, and any community mental health clinic or center administered by the State of North Carolina."

The language of the statute itself makes it very clear that area mental health programs, including facilities operated thereunder, and local mental health clinics as established under Articles 2A and 2C of Chapter 122 fall squarely within the definition of a "treatment facility". Further, the inpatient units, the outpatient program, and the partial hospitalization program (which appears to involve patients who spend the day at the hospital but go home at night) are subject to the statutes granting "Patients' Rights", insofar as the particular right or rights involved are pertinent to the type of patient concerned.

So too, any local inpatient facility, including one privately owned or a general hospital, providing contract services to a mental health center is required to protect the individual patient's rights to the same extent that they would be protected were the patient in a State hospital or a community mental health center, etc. A contrary conclusion would permit a treatment facility to abrogate the responsibility levied upon it by the General Assembly by performing its services via contract rather than directly.

G.S. 122-58.8(b) authorizes the district court to order treatment "...at a mental health facility, public or private, designated or licensed by the Division of Mental Health Services...", with the proviso that the expense of treatment at a private facility shall be borne by the patient. Inasmuch as designation of a private facility not under contract to the Division of Mental Health Services or a local program is strictly an alternative to the more usual commitment to a treatment facility, the rights of patients so involuntarily committed must be protected to the same extent as all other involuntarily committed patients. Compare 44 N.C.A.G. 64 (1974).

Article 10 of Chapter 122 provides for the licensing and control of private mental hospitals within this State. G.S. 122-81.1, which is a part of Article 10, specifies that any person may voluntarily admit himself to this type of private hospital "in accordance with the procedure specified in Article 4" of Chapter 122. Of course, Article 4 is the basic provision for voluntary admission to a "treatment facility"; thus, again this type of admission would merely be a substitute for voluntary admission to a State or locally operated facility with the same requirement existing for guarantee of the basic human rights of a patient.

Conversely, it would appear that a halfway house or a group home does not properly fall within the functional area of a treatment facility. The pertinent statutes dealing with patients' rights do not address these types of establishments. The halfway house or the group home is designed for placement of the individual back in a community as distinguished from placement in a mental health facility and the statutorily granted patients' rights would not apply to residents therein.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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20 June 1975

Subject: Criminal Law and Procedure; Motor Vehicle Violations; Issuance of a Capias on a Citation

Requested by: Captain D. R. Emory
State Highway Patrol

Question: May a capias be issued on the basis of an unsworn traffic citation?

Conclusion: No.

A citation under G.S.15A-302 is issued by a law-enforcement officer and thus is not subject to judicial review. G.S.15A-305 does not provide for the issuance of a capias (order for arrest) on the basis of a citation. G.S.15A-302 does, however, allow for issuance of a criminal summons or a warrant for the same offense, either of which could be a basis for an order for arrest.

For the general inadequacies of a citation as a basis of prosecution, see 43 N.C.A.G. 45 (1973); *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838 (1971); G.S. 15A-922.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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24 June 1975

Subject: Health; Vital Statistics; Change in Birth Certificate Pursuant to Out-of-State Court Order

Requested by: Mr. Rodney C. Hobbs, Chief
Administrative Services
Division of Health Services
N.C. Department of Human Resources

Questions: (1) Is the Registrar of Vital Statistics authorized to note a change of name on a North Carolina birth certificate in his file when an individual's request for such notation is based upon a court order

changing the individual's name which has been issued by another state where the individual has established residence?

(2) Where one notation of name change has been made on a North Carolina birth certificate in his file, is the Registrar of Vital Statistics authorized to note a subsequent name change (other than resumption of original name) on the birth certificate based upon a court order which has been issued by another state where the individual has established residence?

Conclusions: (1) Yes.

(2) Yes.

Chapter 101 of the General Statutes sets forth the procedures for changing names via judicial action in this State. G.S. 101-5 requires the State Registrar of Vital Statistics to note the change of names on the individual's birth certificate in his custody upon receipt of a court order directing the change. Chapter 101, however, when literally read appears to speak in terms of orders issued within the State of North Carolina. Additionally, G.S. 101-6 further provides:

> "No person shall be allowed to change his name under this Chapter but once, except that he shall be permitted to resume his former name upon compliance with the requirements and procedures set forth in this Chapter for change of name."

The key to answering the questions presented here relative to out-of-state orders is to be found in the following language of Article IV, Section 1 of the Constitution of the United States:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Under this doctrine, orders and judgments issued by another state should be put upon the same footing as if they had been issued

in North Carolina. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523 (1966). Thus, an out-of-state order may serve as the basis for noting a name change on the birth certificate in the Registrar's files.

Turning to the second question, the one change limitation in Chapter 101 clearly refers to the ability to obtain a name change in North Carolina through our court system via the procedures specified in that Chapter. G.S. 101-6 could not possibly have any extraterritorial effect so as to preclude an individual who is no longer a North Carolina resident from availing himself of the statutory privileges granted by his new state of residence.

Since our statutes do not prohibit the noting of the change of name on the birth certificate by the Registrar, and since this action is not contrary to good morals nor inimical to public welfare, full faith and credit must be given to the laws of the state issuing the order. See *Lockman v. Lockman*, 220 N.C. 95, 104 (1941). The validity and effect of this order must be determined by reference to the laws of the issuing state. *Marketing Systems v. Realty Co.*, 277 N.C. 230, 234-235 (1970).

Of course, the State Registrar is authorized to promulgate rules and regulations relative to the type and amount of proof which must be provided as a basis for the requested change. See G.S. 130-60. Thus, the use of forms designed by the Registrar, authentication of the order changing the name, submission of copies to or citations to pertinent law of the issuing state, etc., may all be required of individuals requesting name change notations on the original birth certificate in the files of the Registrar.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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INDEX TO ATTORNEY GENERAL OPINIONS

(Cummulative Since July 1, 1974)

(Pamphlets I and 2, Volume 44)

A

AD VALOREM TAXES (See Taxation; Ad Valorem)

ADMINISTRATION OF ESTATES
Guardian; Mental Patients; Appointment of Out-of-State Resident as Guardian 152

ALCOHOLISM RESEARCH AUTHORITY
Appropriations; Expenditures; Agreements; Overhead Expenses of Research Facilities; Payment by Authority 106

B

BUSINESS AND COMMERCE
Mental Health; Applicability of Professional Corp. Act to Foreign Corp. Providing Psychiatrists for Area Mental Health Program 92

C

CLERKS OF SUPERIOR COURT (See Courts, Clerk of Superior Court)

CONFLICT OF INTEREST (See Public Officers and Employees)

CONSTITUTIONAL LAW
Elections of County Board of Education 337
Executive Powers; Authority of Governor of N. C. to Transfer the Child Day-Care Licensing Bd. from the N. C.

Dept. of Adminis. to N. C. Dept. of Human Resources; Art. III, Sec. 5 (10) of the Const. of N. C. 222

Executive Powers; Authority of the Gov. of N.C. to Transfer Office of Child Dev. from N.C. Dept. of Admin. to N.C. Dept. of Human Res. and State Office of Economic Oppor. from N.C. Dept. of Human Res. to N.C. Dept. of Admin.; Art. III, Sec. 5(10) of Const. of N.C. 69

Religion; Highway Map 80

CONTRACTS (See Public Contracts)

CORPORATIONS

Mental Health; Business and Commerce; Applicability of Professional Corp. Act to Foreign Corp. Providing Psychiatrists for Area Mental Health Program 92

Professional Corp. Act; G.S. 53-127; G.S. 55B-3 100

COUNTIES

Commissioners; Vacancies Occurring on the Board; Political Affiliation of an Appointee 240

Health; Definition and Abatement of Mass Gatherings as Nuisances 142

Municipal Corporations; Public Utilities; Authority of Counties and Municipalities to Own or Engage in Business of Operating Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest in, Operate, Subsidize or Finance Operations of Such Public Utilities through a Joint Agency or Nonprofit Corporation 85

Subdivision Ordinance 251

Zoning Authority; State-Owned Property; Highway Rights of Way 216

COURTS
Clerk of Superior Court; Compliance with Judgment; Lack of Jurisdiction of Court to Enter Judgment; Interpretation of G.S. 7A-111 97
Costs; Special Proceedings; Suits *in Forma Pauperis* 147
Infants and Incompetents; Concurrent Jurisdiction Over Juveniles on Probation 187
Juveniles; Mental Health; Authority of District Court Judge to Order Placement of Juveniles in Centers for Mentally Retarded 126
Mental Health; Authority of Trial Judge to Direct Verdict of Not Guilty by Reason of Insanity 124
Mental Health; Criminal Law; Extention of 60-day Period for Determining Mental Competence of Defendant 332
Social Services; Child Abuse; Husband-Wife Privilege in Criminal Prosecutions 201

CRIMINAL LAW AND PROCEDURE
Forfeiture of Motor Vehicle; Possession of Controlled Substance 262
Law Enforcement; Juveniles; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq. 179
Motor Vehicle Violations; Issuance of a Capias on a Citation 346

D

DOUBLE OFFICE HOLDING
Conflict of Interest; Member of Town Aldermen Serving as

Member of Town's Auxiliary Police 123

DRIVERS' LICENSES (See Motor Vehicles; Drivers' Licenses)

E

ELECTIONS
Absentee Ballots; Validity of Absentee Ballots when Voter Expects to be Absent from County but is Not Absent on Election Day 110
Form of Local Ballots; Location of Party Columns 72

EXECUTIVE POWERS
Constitutional Law; Authority of Gov. of N.C. to Transfer the Child Day-Care Lic. Bd. from N.C. Dept. of Adminis. to N.C. Dept. of Human Resources; Art. III, §5(10) of Const. of N.C. 222
Constitutional Law; Authority of the Gov. of North Carolina to Transfer Office of Child Dev. from N.C. Dept. of Admin. to N.C. Dept. of Human Res. and State Office of Economic Oppor. from N.C. Dept. of Human Res. to N.C. Dept. of Admin.; Art. III, §5(10) of Const. of N.C. 69

F

FACILITY SERVICES
Licensing; Appeal from Denial or Revocation of License of a Home for the Aged and Infirm or a Family Care Home 46
Licensing; Public Access to Licensure Records of Homes for the Aged and Infirm and Family Care Homes 137

FEDERAL DISASTER RELIEF ACT
Grants to Individuals and Families; Public Purpose; Acceptance of Advance from Federal Government 275

FINGERPRINTING
Law Enforcement; Juveniles; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq. 179

FISHING REGULATIONS (See Dept. of Natural & Economic Resources)

H

HEALTH
Council on Sickle Cell Syndrome; Conflict of Interest; Employee of N.C. Div. of Health Services also Serving as Member of Council on Sickle Cell Syndrome 268
Counties; Definition and Abatement of Mass Gatherings as Nuisances 142
County Board of Health; Limitations on Members' Terms of Service 225
Education; Immunization; Chiropractors; Exemption from Immunization of Child of Chiropractor 334
Education; Immunization Requirements Detrimental to Child's Health 155
Medical Care Commission; Exemption from Certified Ambulance Attendant Requirements 202
Public Records; Reports of Medical Examiners; Autopsy Reports 193
Regulation of Sewage Disposal in Foodhandling and Lodging Establishments; Construction of G.S. 72-46, G.S. 130-160 and G.S. 143-215 18
Sanitation of Food and Lodging Establishments; Definition of

"Private Clubs" and "Occasional"; G.S. 72-49 182
Solid Waste Disposal; Ch. 130, Art. 13B; G.S. 153A-292; Applicability of Local Ordinances 40
Student Records; Reporting of Certain Diseases; Construction of Public Law 93-380 and G.S. 130-81 163
Vital Statistics; Change in Birth Certificate Pursuant to Out-of-State Court Order 347

HIGHWAY MAP
Constitutional Law; Religion 80

I

INFANTS AND INCOMPETENTS
Courts; Concurrent Jurisdiction Over Juveniles on Probation 187
Corrections; Abortions; Consent for Abortion on Minor Female Committed to Division of Youth Development 213
Corrections; Commitment of Mentally Retarded Juveniles to Centers for Retarded by Department of Correction 203
Day-Care Plans; Applicability of 20% Tolerance to Day-Care Facilities Only; Maximum Number of Children in a Day-Care Plan 234
Guardian, Appointment of; Estates 227
Mental Health; Rights of Minor Patients in Treatment Facilities 3
Mental Health; Voluntary Admission of Runaway Minors to Treatment Facilities 6
Youth Development, State Dept. of; Medical Treatment for Students;

Consent for Surgical Operations on Minor Students 21

INSURANCE
Title Insurance; Attorneys; Proceeds from Title Insurance Agency; G.S. 58-135.1 114

INTEREST
Security Interest in Personal Property Under Revolving Charge Accounts 278

J

JUVENILES (See also Social Services and Infants and Incompetents)
Correction, Dept. of; Division of Youth Development; Photographing Juveniles 146
Courts; Mental Health; Authority of District Court Judge to order Placement of Juveniles in Centers for Mentally Retarded 126
Detention; Youth Development; Detention Homes 238
Jails; Detention of Juveniles to be Tried as Felons 208
Juvenile Records; Improper for City-County Bureau of Identification of the City of Raleigh & County of Wake to Allow Public Inspection of Arrest Records of Juveniles; Art. 23, Chapter 7A of the General Statutes 305
Law Enforcement; Fingerprinting Children; G.S. 114-19; G.S. 7A-277, et seq. 179

L

LICENSES AND LICENSING
Chiropractors; Constitutionality of House Bill 725 325

Wastewater Treatment Plant Operators Certification Commission; (G.S. 90A-35, et seq., as amended by G.S. 143B-300); Considered to be an Occupational Licensing Board as Defined by G.S. 93B-1, et seq. 144

M

MEDICAID (See Social Services)

MEDICAL EXAMINERS
Coroner; Custody and Control of Dead Body when Death Caused by Criminal Act or Default 330

MENTAL HEALTH
Area Mental Health Boards; Authority to Set Salaries of Employees 67
Area Mental Health Boards; Out of State Hospitals; Contracts 260
Area Mental Health Programs; Authority to Change the Name of an Area Mental Health Program 233
Area Mental Health Programs; Removal of Area Mental Health Board Members; Terms of Area Mental Health Board Officers 197
Area Mental Health Programs; Single County Program as a Public Authority 185
Area Mental Health Programs; Testing of Individual Models for Delivery of Mental Health Services 105
Business and Commerce; Applicability of Professional Corp. Act to Foreign Corp. Providing Psychiatrists for Area Mental Health Program 92
Commitment Rehearings; Waiver of

Notification of Time and Place of Rehearing 33
Community Mental Health Centers; Patients' Records; Privacy; Dept. of Human Res. 282
Competency of Patients; Authority of Chief Medical Officer of Regional Mental Health Facility to Issue Certificate of Sanity 291
Corrections; Courts; Voluntary Admission of Convict to State Regional Mental Health Facility 336
Corrections; Infants and Incompetents; Commitment of Mentally Retarded Juveniles to Centers for Retarded by Department of Correction 203
Corrections; Involuntary Commitment of Convicts; Impermissibility of Administrative Transfer of Convict from Corrections System to Mental Health Services Forensic Unit 295
Courts; Authority of Trial Judge to Direct Verdict of Not Guilty by Reason of Insanity 124
Courts; Collection of Fees for Services Rendered by Local Mental Health Clinics 328
Courts; Criminal Law; Extension of 60-Day Period for Determining Mental Competence of Defendant 332
Criminal Law and Procedure; Involuntary Commitment of a Defendant Sent to a Mental Health Facility Under G.S. 122-83 55
Education; Confidentiality of Patients' Records; Parental Access to Mental Health & Medical Records of their Children 231
Examination of Mentally Ill or Inebriate Person; Responsibility of County 150

Forensic Patients; Placing Potential Escapees in Seclusion 139
Infants and Incompetents; Appointment of Guardian; Estates 227
Infants and Incompetents; Rights of Minor Patients in Treatment Facilities 3
Infants and Incompetents; Voluntary Admission of Runaway Minors to Treatment Facilities 6
Involuntary Admission; Liability for Medical Services Rendered to Mental Patients by General Hospitals 288
Involuntary Commitment; Acceptance of Respondent at Regional Mental Health Facility Prior to Receipt of Commitment Order 317
Involuntary Commitment; Authority of Attending Physician to Determine Place of Pre-hearing Custody 25
Involuntary Commitment; Conditional Discharge or Release of Forensic Patients 112
Involuntary Commitment; Determination of Place of Detention Prior to Commitment Hearing 15
Involuntary Commitment; Examination of Respondent; Release of Respondent Prior to Hearing Upon Change of His Condition 258
Involuntary Commitment; Patients; Discharge; Liability of Treatment Facility; Transportation 270
Involuntary Commitment; Propriety of the "Qualified Physician" Acting as Physician in Charge of Treatment 36
Involuntary Commitment; Release of Patient Charged with Crime 189
Involuntary Commitment; Requirement for Examination and Report by a

Qualified Physician in Involuntary Commitment Proceedings 245
Involuntary Commitment; Return of Respondent to Mental Health Facility for Treatment Pending Commitment Hearing 8
Involuntary Commitment; Supervision and Treatment of a Respondent Detained in a Community Mental Health Center or Regional Mental Health Facility 13
Involuntary Commitment; Voluntary Admissions; Consent to Surgery on Mental Patients; Applicability of Patients' Rights Bill to Local General Hospitals 64
Involuntary Commitment and Voluntary Admission; Patients' Rights; Meaning of the Term "Institutionalized Patient" 272
Involuntary Commitment and Voluntary Admission; Patients' Rights in Area Mental Health Programs, Community Centers, Private Hospitals, Halfway Houses and Group Homes 343
Involuntary Commitment Proceedings; Vaginal Examination as Part of Pre-hearing Examination and Post-hearing Treatment 195
Local Mental Health Clinics; Authority to Issue a Certificate of Incompetence Under G.S. 35-3 190
Mentally Ill or Inebriate Persons; Patients' Rights; Contraband; Search and Seizure; Regulation of Parking; Assault 27
Mentally Ill or Inebriate Persons; Transportation to State Hospital; Responsibility of County 45

Patients' Rights; Liability of Patients for Damage to Personal Property 218
Personnel; Exemption of Physicians from Mandatory Retirement at Age 65 102
Physicians & Doctors; Members of Medical Teams; Personal Liability to Patient for Negligence in Operation or Treatment 299
Public Officers and Employees; Appointment to Area Mental Health Boards 220
Transfer of Mentally Ill Person or Inebriate to N.C. Mental Health Facility from Another State; Duration of Detention of Transferred Patient and Nature of Additional Commitment Proceedings Required 134
Voluntary Admissions; Applications for Admission to Treatment Facilities by Persons who are *Non Compos Mentis* 74
Voluntary Admissions; Involuntary Return, Involuntary Commitment, and Discharge of Escapee from a Treatment Facility 52

MILK COMMISSION
Sale of Milk by Retail Stores as "Loss Leader"; Sales Below Cost 169

MOBILE HOMES
State Building Code; Local Minimum Housing Code, Applicable to Mobile Homes, Except as to those Items Required to be Pre-inspected During Manufacturing Process; G.S. 143-138; G.S. 143-144, et seq. 132

MOTOR VEHICLES
Driver's License; Bikes with Helper Motors 322
Drivers' Licenses; Financial Responsibility

Act of 1953; Unsatisfied Judgments 250
Driver's License; Limited Driving Privileges; Bond Forfeiture 44
Driver's License; Points, G.S. 20-16, and Provisional Licensee, G.S. 20-13; Moving Violation 101
Emergency Warning Devices; Civil Air Patrol Emergency Service Vehicles 63
Motor Vehicle Dealers; Use of Dealer Plates 188
Operating Mini-Bikes, Motorcycles or Go-Carts on Sub-division Streets Which are Not State Roads or Maintained by the State 314
Registration Rental Vehicles; U-Haul (G.S. 20-84.2) 165
Stopping for Stopped School Bus; Multi-Lane Highway 302
Trucks; Overweight Penalties 307
Weight Limitations; Streets and Highways 224

MUNICIPAL CORPORATIONS
Counties; Public Utilities; Authority of Counties and Municipalities to Own or Engage in Business of Operating Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest in, Operate, Subsidize or Finance the Operations of such Public Utilities through a Joint Agency or Nonprofit Corporation 85
Public Officers, Dual Office Holding, Conflict of Interest; Member of Town Aldermen Serving as Member of the Town's Auxiliary Police - G.S. 160A-284, G.S. 160A-282 123

NURSE PRACTICE ACT
Mechanical Act; G.S. 90-167; Controlled Substances Act; Applicability Thereof 253

PAROLE
Escape; Detainers 108
Officers; Arrest 117
Parole Commission; Bond 273
Work Release; Term of Imprisonment 76

PRISONS AND PRISONERS
Criminal Law & Procedure; Escape, Warrants; Arrest 109
Dept. of Correction; Appellate State Records 304
Study Release 154
Work Release; Parole Commission 38
Work Release; Union Activities 157

PROFESSIONAL CORPORATION ACT (See Corporations)

PUBLIC CONTRACTS
Bid Bonds; Incomplete Bid Bonds; Minimum Number of Bids 77
Conflict of Interest; Public Officers; City Contracting with Corporation in which Councilman is Officer - Void Contract 128
Counties; Lease-Purchase Contract Subject to Public Bidding Requirements of Art. 8, Ch. 143 59
Purchase and Contract Div.; Boards of Education; Community Colleges; Purchase of Supplies; Material and Equipment; Printing 176

PUBLIC OFFICERS & EMPLOYEES
Conflict of Interest; N.C. Mental Health Study Commission; Contract for Services of Members Thereof 293
Double Office Holding; Trustee of Community College - Member of State Board of Elections 342

Mental Health; Appointment to Area Mental Health Boards 220
Parole; Arrest 117
Public Contracts; Conflict of Interest; City Contracting with Corp. in which Councilman is Officer - Void Contract 128
State Employees; Fourteenth Amendment; Personal Privacy 159

PUBLIC RECORDS
Police Investigative Memoranda and Reports; Right of Public Inspection 340

PUBLIC UTILITIES
Counties; Authority of Counties and Municipalities to Own or Engage in Business of Operating Electric or Telephone Utility Systems, or to Jointly Own, Acquire a Beneficial Interest in, Operate, Subsidize or Finance the Operations of such Public Utilities through a Joint Agency or Nonprofit Corp. 85

R

REORGANIZATION OF STATE GOVERNMENT (See State Depts., Institutions and Agencies)

S

SOCIAL SERVICES
Applicability of Ins. Law & Laws Regulating Hospital, Medical & Dental Service Corps. to Department Contract with Private Contractor for Latter to Provide Payment to Providers of Medical Services, etc., Chapters 57 & 58 of General Statutes; Part 5, Art. 2, Chapter 108 of General Statutes 296

Authority to Contract for Medicaid Services Payments by a Fiscal Agent; G.S. 108-60 172
Closed-End Budget for Financing Programs of Public Assistance at County Level; Chapter 1418, Sess. Laws 1973, 2nd Sess.; Legality of Soc. Serv. Comm. Proviso 30
Courts; Child Abuse; Husband-Wife Privilege in Criminal Prosecutions 201
Juvenile Hearings in Cases Involving Child Neglect and/or Abuse and Termination of Parental Rights; Evidence; Admissibility of Records Made by Social Workers No Longer Employed by Co. Dept. of Social Services 94
Medical Assistance Program; Propriety of Assigning Title XIX (Medical) Provider Numbers to Part-Time Dental Consultants with the Medical Services Section of the Division of Social Services 174
Social Services Commission; Standards for Selection of County Social Services Board Members 183
State's Supervisory Responsibilities & Powers over County Departments of Social Services with Request to Administration of Public Assistance Programs; G.S. 108-23; G.S. 108-52(c) & (d); §402(a)(3), Title IV-A, Soc. Sec. Act; §1902(a)(5), Title XIX, Soc. Sec. Act 242

STATE DEPARTMENTS, INSTITUTIONS AND AGENCIES
Aid to the Blind, Chapter 111, General Statutes; Legal Authority of the Div. of Ser. for Blind to Enter into Contract

with Mfr's. Repres. Under Specific Exemption in G.S. 111-27.1 50
Alcoholism Research Authority; Appropriations; Expenditures; Agreements; Overhead Expenses of Research Facilities; Payment by Authority 106
Community Colleges and Technical Institutes; Administrative Procedure Act; Chapter 150A 315
Constitutional Law; Executive Powers; Authority of Governor of N.C. to Transfer the Child Day-Care Lic. Bd. from N.C. Dept. of Adminis. to N.C. Dept. of Human Resources; Art. III, Sec. 5(10) of Const. of N.C. 222
Constitutional Law; Executive Powers; Authority of Gov. of N.C. to Transfer Office of Child Dev. from N.C. Dept. of Admin. to N.C. Dept. of Human Resources and State Office of Economic Opportunity from N.C. Dept. of Human Resources to N.C. Dept. of Admin., Article III, Sec. 5(10) of Const. of N.C. 69
Correction, Dept. of; Amendment of Sentence 1
Correction, Dept. of; Division of Youth Development; Authority to Provide for Coeducational Youth Development Schools 116
Correction, Dept. of; Division of Youth Development; Juveniles; Photographing Juveniles 146
Dept. of Admin.; Standard Specifications for Articles Purchased or Leased by the State; Administrative Pro. Act 286
Dept. of Natural & Economic Resources; Fishing Regulations 266
Economic Opportunity Agencies; Direct Grants from the Dept. of Human

Resources; Chapter 1318 of 1973 Sess. Laws, 2nd Session 60
Governor's Advocacy Council on Children and Youth; Relationship to the Secretary of Human Resources, the General Assembly, and other State Agencies 320
Human Resources, Dept. of; Division of Facility Services - (See Facility Services)
Human Resources, Dept. of; Division of Health Services - (See Health)
Human Resources, Dept. of; Division of Mental Health - (See Mental Health)
Human Resources, Dept. of; Division of Social Services - (See Social Services)
Milk Commission; Sale of Milk by Retail Stores as "Loss Leader"; Sales Below Cost 169
Natural and Economic Resources, Dept. of; Sedimentation Control Commission; Chairman 9
N.C. Arts Council; Visiting Artists' Program; Restricting Participation of Artists to Four Consecutive Years 311
Purchase and Contract Division; Boards of Education; Community Colleges; Public Contracts; Purchase of Supplies, Material and Equipment; Printing 176
Real Property; Leases; Advertisement for Proposals for Space to be Leased by State 206
Reorganization; Relationship Between N.C. Ports Authority and N.C. Dept. of Transportation 141
Reorganization; Transfer of the State Ports Authority by a Type II

Transfer to the Department of Transportation 166
University of N.C., Chapel Hill; Budget; Payroll Deductions 264
University of N. C.; Student Activities; Fee 120
Youth Development Div.; Correction, Dept. of; Authority to Provide for Coed Youth Dev. Schools 116
Youth Development Div.; Infants and Incompetents; Medical Treatment for Students; Consent for Surgical Operations on Minor Students 21

T

TAXATION
Ad Valorem; Classifications; Lands and Properties Belonging to The University of North Carolina at Chapel Hill; G.S. 116-16 210
Ad Valorem; Classification; Real Property Belonging to Elks Club; G.S. 105-278(19) 160
Ad Valorem; Listing of Property for Taxation; G.S. 105-308, -309, -310 235
Refund of Taxes; Statute of Limitations; Extension of Time for Filing Return; G.S. 105-130; G.S. 150-266 247
Sales and Use Taxes; Local Government Sales and Use Tax Act; Distribution of Proceeds; Taxation Districts; G.S. 105-472 229

Y

YOUTH DEVELOPMENT SCHOOLS (See State Departments, Institutions and Agencies)